



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

January 19, 2017

Return Receipt Requested

Certified Mail# 7015301000112675188

In Reply Refer to:

EPA File No. 01R-94-R5

(b) (6)

Flint, Michigan 48503

Dear (b) (6)

This letter is to advise you that the US Environmental Protection Agency's (EPA) External Civil Rights Compliance Office¹ (ECRCO) has completed its investigation of the above-referenced Complaint (Genesee Complaint) and is resolving and closing² this case as of the date of this letter. The Genesee Complaint was dated December 15, 1992, and filed by you on behalf of the St. Francis Prayer Center (Complainants).³ The Genesee Complaint was filed under Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d et seq., (Title VI) and EPA's nondiscrimination regulations found at 40 C.F.R. Part 7.

EPA's investigation focused on allegations of discrimination by the Michigan Department of Natural Resources (MDNR) (later becoming the Michigan Department of Environmental Quality's (MDEQ))⁴ and the Michigan Air Pollution Control Commission (MAPCC)⁵ based on

¹ Formerly the Office of Civil Rights. To eliminate confusion, except where quoting another document, this letter will use the Office's current name, rather than its name at the time of any particular action or correspondence.

² The preliminary finding is made pursuant to 40 C.F.R. §115(c)(1)(i). Given the age of the facts relied upon to make this preliminary finding, EPA is not making recommendations pursuant to 40 C.F.R. §115(c)(1)(ii) which triggers notification of the recipient of its right to engage in voluntary compliance negotiations under 40 C.F.R. §115(c)(1)(iii). However, as explained in this letter, EPA will consider issues related to MDEQ's current public participation process within the context of the pending Flint Complaint (EPA File No. 17RD-16-R5) which raises similar issues regarding public participation in the current day context. Therefore, this case, 01R-94-R5, is closed as of the date of this letter and requires no further action.

³ Letter from (b) (6) to Mr. Valdas Adamkus, Regional Administrator, Region 5, US EPA (Dec. 15, 1992) enclosing letters dated Dec. 15, 1992, to Mr. Herb Tate, Environmental Equity, US EPA and Mr. William Rosenberg, US EPA.

⁴ To eliminate confusion, except where quoting another document, this letter will use the MDEQ's current name, rather than its name at the time of any particular action or correspondence.

⁵ In 1992, the MAPCC was made up of eight commissioners appointed by the Governor representing different state agencies and public interests See MCL § 336.13 (1992). The MAPCC reviewed both MDEQ Air Quality Division staff recommendations and public comment before approving or disapproving applications for all air permits with significant public interest, including the GPS permit. MCL § 336.15 (1992).

race related to granting of a permit to the Genesee Power Station (GPS) in Flint, Michigan under the Clean Air Act (CAA).⁶ The MAPCC and MDNR, were recipients of EPA financial assistance at the time of the alleged discriminatory acts. The MDEQ has received, and continues to receive, federal grants from EPA to run the Michigan Air Pollution Control Program, which carries out the functions formerly delegated to the MAPCC and the MDNR. The CAA permit function currently resides in the Air Quality Division of the MDEQ.

With this letter, EPA makes findings with respect to the original issues raised in this complaint and closes EPA File No. 01R-94-R5. However, EPA also has additional and current serious concerns, set forth below, that are being examined in the context of another ongoing EPA investigation involving MDEQ. That investigation is focused on alleged discrimination by MDEQ based on race, national origin, and disability⁷ in its administration of the Safe Drinking Water Act of 1974 during the Flint drinking water crisis (EPA File No. 17RD-16-R5) (Flint Complaint).

In this letter, EPA provides next steps regarding actions that EPA will expect MDEQ to take in its resolution of the Flint Complaint, and which were previously conveyed to MDEQ, which focus on: (1) improving MDEQ's public participation program to reduce the risk of future disparate treatment; (2) improving MDEQ's development and implementation of a foundational non-discrimination program that establishes appropriate procedural safeguards while addressing civil rights complaints as well as policies and procedures for ensuring access for persons with disabilities and limited-English proficiency to MDEQ programs and activities; and (3) ensuring that MDEQ has an appropriate process in place for addressing environmental complaints. In addition, in this letter EPA makes specific recommendations to MDEQ regarding the GPS facility.

Issues Investigated in EPA Case No. 01R-94-R5

EPA investigated the original issues raised in this complaint: whether the MDEQ and the MAPCC discriminated against African Americans on the basis of race during the public participation process related to the issuance of a Prevention of Significant Deterioration (PSD) operating permit for GPS and the subsequent approval of the facility's Wood Waste Procurement and Management Plan; and whether the permitting of GPS had discriminatory health impacts on African Americans.

In addition, as is EPA's current practice, EPA reviewed MDEQ's compliance with its longstanding obligation to establish a foundational nondiscrimination program through procedural safeguards required by EPA's regulations implementing the federal non-discrimination statutes,⁸ as well as to ensure meaningful access to MDEQ programs and activities for persons with disabilities and limited-English proficiency.

⁶ 42 U.S.C. §7401 et seq.

⁷ Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C §794 (Section 504), and EPA's regulations at 40 C.F.R. Part 7 prohibit discrimination on the basis of disability in any programs or activities receiving federal financial assistance.

⁸ Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Section 13 of Federal Water Pollution Control Act of 1972, and Title IX of the Education Amendments of 1972 (hereinafter referred to collectively as the federal non-discrimination statutes).

Summary of Findings

Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. As implemented by EPA’s regulation, these prohibitions include intentional discrimination as well as practices that have a discriminatory effect on the bases of race, color, or national origin. *See* 40 C.F.R. §§7.35(a), 7.35(b).

As will be discussed in more detail below, EPA finds that the preponderance of evidence⁹ supports a finding of discriminatory treatment of African Americans by MDEQ in the public participation process for the GPS permit considered and issued from 1992 to 1994. In addition, EPA has concerns that MDEQ’s current policies are insufficient to address the potential for discrimination given the deficiencies in MDEQ’s public participation program and procedures.

With respect to the allegations of adverse disparate health effects raised in the original complaint, EPA conducted four analyses to assess risk of health effects and did not find sufficient evidence to establish adversity/harm with respect to health effects. Therefore, there is insufficient evidence to support a *prima facie* case of adverse disparate impact.

In addition, during the course of its investigation, EPA determined that MDEQ had not been in compliance with its longstanding obligation to establish procedural safeguards required by EPA’s regulations implementing the federal non-discrimination statutes. For almost 30 years, MDEQ failed to provide the foundational nondiscriminatory program as required by non-discrimination regulations to: provide a continuing notice of non-discrimination;¹⁰ adopt grievance procedures that assure the prompt and fair resolution of complaints alleging violations of the non-discrimination statutes and EPA’s implementing regulations¹¹; and designate at least one person to coordinate its efforts to comply with its obligations under the federal non-discrimination statutes and EPA’s implementing regulations.¹² The purpose of these regulatory requirements is to ensure that recipients have established a program that will allow it to meet its responsibilities under the Federal non-discrimination statutes. MDEQ also failed to have in place policies and procedures to ensure that persons with disabilities and limited-English proficiency have meaningful access to MDEQ programs and activities.

In its investigation, EPA reviewed materials provided by the Complainants and by MDEQ, as well as other relevant material that was submitted to EPA or that EPA found through its investigation. This information included: environmental impact reports, facility permits and permit applications, monitoring reports, risk assessments, health studies, and materials from litigation related to the GPS permit.

⁹ A finding by EPA that a recipient of EPA financial assistance has violated Title VI and EPA’s implementing regulations must be supported by a preponderance of the evidence which means that the version of facts alleged is more likely than not the correct version.

¹⁰ 40 C.F.R. § 7.95 (a).

¹¹ 40 C.F.R. § 7.90.

¹² 40 C.F.R. § 7.85(g).

EPA's investigation also included site visits, witness interviews with former MAPCC Commissioners, community residents, and MDEQ employees, and public participation records. Moreover, EPA reviewed current public participation policies, guidance, and procedures provided by MDEQ, as well as MDEQ's policies for addressing discrimination and MDEQ's public website.

Background

GPS is a 35 megawatt power plant located in Genesee Township, Michigan. It is permitted to burn high quality wood-waste, natural gas, animal bedding, and tire derived fuel. Genesee Township is a primarily rural township in north Genesee County that borders the City of Flint to the south. The community closest to the GPS facility within the city of Flint was and continues to be predominantly African American.¹³

On June 8, 1992, Genesee Power Station Limited Partnership (GPSLP) applied to the Air Quality Division of MDEQ for an Air Use Permit under the CAA to operate GPS.¹⁴ The first GPS hearing was held at a Michigan Public Health Department building in Lansing on October 27, 1992.¹⁵ MDEQ reported that it received significant comments and suggested the hearing be postponed until the next meeting to allow staff time to review all the comments.¹⁶

The MAPCC continued the GPS hearing on December 1, 1992.¹⁷ During that time, MDEQ was to resolve concerns MAPCC Commissioners raised during the October hearing; prepare a revised air toxics analysis; and respond to public comment.¹⁸ The MAPCC also extended the public comment period for an additional three weeks to allow the company time to work with the community and the MDEQ to resolve concerns that had been raised.¹⁹

MDEQ completed a revised draft permit on November 30, 1992.²⁰ The second GPS hearing was held in Lansing during an MAPCC meeting that started at 9 am. At 12:40 a.m. on December 2, 1992, the MAPCC approved the permit authorizing the construction of GPS, but required a Wood Waste Procurement and Monitoring Plan, and an Ash Testing Plan be submitted and approved before trial operation of the facility.²¹

In October 1993, EPA's Environmental Appeals Board (EAB)²² upheld the validity of the GPS permit, but asked the MDEQ to consider whether fuel cleaning ("the removal of wood painted or treated with lead-bearing substances") for the wood that would be burned in the facility

¹³ Brown Longitudinal Tract Database (LTDB) based on decennial census data, 2000 & 1990 as presented in the U.S. Department of Housing and Urban Development's AFFH Data and Mapping Tool.

¹⁴ Permit Application No. 579-92, MDNR AQD, June 8, 1992.

¹⁵ MAPCC Meeting Minutes, Lansing, Mich. (Oct. 27, 1992) at 1.

¹⁶ *Id.*, at 5.

¹⁷ *Id.*, at 5. See also, Transcript of MAPCC Meeting, October 27, 1992, Lansing, Michigan, at 174.

¹⁸ Transcript of MAPCC Meeting, October 27, 1992, Lansing, Michigan, at 174-79.

¹⁹ MAPCC Meeting Minutes, Lansing, Mich. (Oct. 27, 1992) at 7. The extended comment period closed on November 17, 1992, providing a total written comment period of 42 days.

²⁰ Transcript of MAPCC Meeting, December 1, 1992, Part 1, Lansing, Michigan, at 12-13.

²¹ MAPCC Meeting Minutes, Lansing, Mich. (Dec. 1, 1992) at 11.

²² Audio Tape Recording of MDNR Meeting, December 21, 1993, Tape 1 Side A, at 3:10-3:18.

constituted the Best Available Control Technology (BACT) for lead emissions.²³ On December 21, 1993, the MDEQ held a hearing to discuss fuel cleaning for the GPS facility.²⁴

MDEQ determined that fuel cleaning was considered the BACT for lead emission²⁵ and on December 29, 1993, issued a modified permit to GPS.²⁶ The modified permit required that GPS ensure that lead-bearing substances would not be burned at the facility.²⁷

On October 20, 1994, MDEQ held a hearing to receive public comment on the proposed Wood Waste Plan.²⁸ This hearing was closed before all those signed up to provide comment were able to provide their comments.²⁹ On December 22, 1994, MDEQ held a special hearing in order to allow one of the commenters to make a presentation.³⁰

On January 12, 1995, MDEQ issued a supplement to the permit requiring revisions, clarifications, and modifications in the Wood Waste Plan.³¹

Issue 1: Public Participation

The Complaint alleged that African Americans were treated in a discriminatory manner during the public participation process for the GPS permit from 1992 to 1994. The Complainants described a series of instances during the GPS hearings where African Americans were treated less favorably than non-African Americans who were participating in MDEQ's public participation processes.

1. Legal Standard

EPA's investigation was conducted under the authority of Title VI of the Civil Act of 1964, and EPA's nondiscrimination regulations (40 C.F.R. Part 7), consistent with EPA's Case Resolution Manual, and prior standard operating procedures addressing complaint investigation and resolution. Title VI prohibits intentional discrimination on the basis of race, color, or national origin.³² EPA's Title VI implementing regulations at 40 C.F.R. §7.35(a) state that a recipient shall not on the basis of race, color, national origin provide a person any service, aid, or other benefit that is different, or is provided differently from that provided to others under the program or activity.

²³ *Id.*, at 3:18-3:40. See also *In the Matter of Genesee Power Station*, E.A.B., PSD Appeal Nos. 93-1 through 93-7 (Oct. 22, 1993) at 43.

²⁴ Audio Tape Recording of MDNR Meeting. December 21, 1993, Tape 1 Side A, at 0:20-3:10.

²⁵ Letter from Russell Harding, Deputy Director, MDNR to "Interested Party", Dec. 29, 1993 at 1-2.

²⁶ *Id.*, at 1.

²⁷ *Id.*, at 1-2; See also Permit No. 579-92 for Genesee Power Station Ltd. Partnership, Dec. 29, 1993 at 6-7.

²⁸ Transcript of Meeting, MDNR, AQD, October 20, 1994, Flint, Michigan, at 2-3. See Interview with MDNR/AQD, in Lansing, Mich. at 35 (Mar. 26, 1999).

²⁹ Audio Tape Recording of MDNR Meeting. December 22, 1994, Tape 1 Side A, at 1:50-2:20.

³⁰ *Id.*, at 2:25-2:53.

³¹ Letter from Russell Harding, Deputy Director, MDNR to A. Sarkar, Jan. 12, 1995 at 1-2.

³² See *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983).

A claim of intentional discrimination under Title VI alleges that a recipient intentionally treated individuals differently or otherwise knowingly cause them harm because of their race, color, or national origin. Intentional discrimination requires a showing that a “challenged action was motivated by an intent to discriminate.”³³ Evidence of “bad faith, ill will or any evil motive on the part of the [recipient] is not necessary.”³⁴ Evidence in a disparate treatment case will generally show that the recipient was not only aware of the complainant's protected status, but that the recipient acted, at least in part, because of the complainant's protected status.³⁵ Disparate treatment cases can involve either “individual” or “class” discrimination (or both).

EPA will evaluate the “totality of the relevant facts” including direct, circumstantial, and statistical evidence to determine whether intentional discrimination has occurred.³⁶ For example, evidence to be considered may include:

- statements by decision makers,
- the historical background of the events in issue,
- the sequence of events leading to the decision in issue,
- a departure from standard procedure (*e.g.*, failure to consider factors normally considered),
- legislative or administrative history (*e.g.*, minutes of meetings),
- the foreseeability of the consequences of the action,
- a history of discriminatory or segregated conduct.³⁷

If a *prima facie* case of disparate treatment is established, the recipient then has the burden of producing a legitimate, non-discriminatory reason for the challenged policy or decision and the different treatment.³⁸ If the recipient articulates such a reason, EPA must then determine if there is evidence that the proffered reason is false, *i.e.*, that the nondiscriminatory reason or reasons or the defendant gives for its actions are not the true reasons and are actually a pretext for discriminatory intent.³⁹

2. Analysis

EPA's investigation of the public participation issue focused in part on the GPS public involvement processes between 1992 and 1994. At the time of the GPS permit hearings, Michigan was implementing the public participation requirements established under the Clean

³³ *Elston*, 997 F.2d at 1406.

³⁴ *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).

³⁵ Congress has prohibited acts of intentional discrimination based on the protected bases identified in Section I. These protections are statutory, not constitutional, and the analysis under the civil rights statutes at issue here may differ from the different levels of protections the Equal Protection Clause provides to classifications based on sex; disability; and race, color, and national origin.

³⁶ See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

³⁷ See *Arlington Heights v. Metro. Hous. Redevelopment Corp.*, 429 U.S. 252 at 266-68 (1977) (evaluation of intentional discrimination claim under the Fourteenth Amendment).

³⁸ The recipient's explanation of its legitimate reason(s) must be clear and reasonably specific. Not every proffered reason will be legally sufficient to rebut a *prima facie* case. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55, 258 (1981).

³⁹ See *Burdine*, 450 U.S. at 255-56; *Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1162-63 (11th Cir. 2006).

Air Act with regard to notice and comment. These requirements leave significant room for discretion as to how the hearing process and other elements of public involvement are implemented.

The MAPCC,⁴⁰ which ran the October and December 1992 GPS public hearings and issued the initial GPS operating permit, had no written or formalized operating procedures for conducting its meetings, but instead exercised discretion in conducting meetings in accordance with a set of practices established over time.⁴¹ MDEQ,⁴² which took over the function of running permit hearings when the MAPCC was disbanded, did not have any formal policies and procedures governing public hearings in place during 1993 and 1994 when the final GPS hearings were held.⁴³

EPA also reviewed a variety of documents related to facility permits, permit hearings, and permit decisions. EPA was told that the MAPCC had developed a series of unwritten standard operating procedures that it used to manage hearings.⁴⁴ To assist in its understanding of any unwritten hearing procedures, EPA also reviewed recordings of MDEQ and MAPCC meetings and permit hearings and it interviewed MAPCC Commissioners, MDEQ staff, the Complainants, and others who were present at various meetings and hearings during the 1992-1994-time period.

As described below, decisions were made by both the MAPCC and MDEQ officials that resulted in African Americans being treated differently and less favorably than Whites.

a. December 1, 1992 Hearing

On June 8, 1992, Genesee Power Station Limited Partnership (GPSLP) applied to the Air Quality Division for an Air Use Permit under the CAA to operate GPS.⁴⁵ GPS was also required to submit a Wood Waste Procurement and Monitoring Plan (Wood Waste Plan) before starting trial operation of the facility to ensure that GPS only used wood waste fuel that complied with the

⁴⁰ The MAPCC set an agenda for each meeting, including consideration of Administrative Rules packages, draft permits (*i.e.*, permit hearings), and consent orders, and had a regularly scheduled agenda item to give individuals and organizations an opportunity to discuss items with the MAPCC that were not on the agenda. Letter from John Fordell Leone, Assistant Attorney General, Environment, Natural Resources, and Agriculture Division, Michigan Department of Attorney General, to Velveta Golightly-Howell, Director, Office of Civil Rights, US EPA (Nov. 6, 2015).

⁴¹ See Interview with Former MAPCC Chairman at 2-4 (Mar. 26, 1999). See also Interview with Former MAPCC Commissioner B (Mar. 30, 1999) (recalling no specific process for establishing the order of speakers).

⁴² In 1992, the Air Quality Division was located within the Michigan Department of Natural Resources (MDNR). When the MAPCC was disbanded in 1993, the Air Quality Division took over the MAPCC functions.⁴² In 1995, the MDNR was split into two new departments, the DNR and the Michigan Department of Environmental Quality (MDEQ), which became responsible for environmental permitting and enforcement. MDEQ's current authority includes: "(b) Issue permits for the construction and operation of sources, processes, and process equipment, subject to enforceable emission limitations and standards and other conditions reasonably necessary to assure compliance with all applicable requirements of this part, rules promulgated under this part, and the clean air act." MCLS § 324.5503.

⁴³ Letter from Todd B. Adams, Assistant Attorney General, Natural Resources Division, Department of Attorney General, to Ann Goode, Director, Office of Civil Rights, US EPA, Response to Question 3 (July 28, 1999).

⁴⁴ See Interview with Former MAPCC Chairman (Mar. 26, 1999). See also Interview with Former MAPCC Commissioner B (Mar. 30, 1999) (recalling no specific process for establishing the order of speakers).

⁴⁵ Permit Application No. 579-92, MDNR AQD, June 8, 1992.

requirements of the permit. The Wood Waste Plan was to go through a public comment process before it could be approved.

On October 5, 1992, the draft GPS permit was made available to the public and a public comment period was announced.⁴⁶ The first GPS permit hearing was held on October 27, 1992 in Lansing. At the hearing, MDEQ reported that it had received significant comments and suggested the hearing be postponed until the next meeting to allow staff time to review all the comments.⁴⁷ MDEQ staff recommended a revision to several permit conditions.⁴⁸ The MAPCC decided to continue the GPS hearing on December 1, 1992, their next scheduled meeting.⁴⁹ In the intervening time, MDEQ was to resolve concerns MAPCC Commissioners raised during the October 27th hearing; prepare a revised air toxics analysis; and respond to public comment.⁵⁰ The MAPCC also extended the public comment period for an additional three weeks.⁵¹

EPA has found no evidence that notice was given to the public in advance of the meeting stating that the GPS permit hearing, as opposed to the general MAPCC meeting or any other permit hearings on the schedule, would begin at 9:00 a.m. The agenda handed out at the December 1, 1992 MAPCC meeting agenda lists 8 items in what appears to be the time between 9 a.m. and 1 p.m.⁵²

i. Requests to speak either in advance of or out of order at hearings

According to MAPCC Commissioners, the MAPCC regularly accommodated elected representatives at MAPCC meetings based upon their schedules.⁵³ Commissioners stated that they would allow elected representatives to offer their comments on a particular permit before the scheduled hearing if their schedules dictated that they be elsewhere when that permit hearing was to take place.⁵⁴ The MAPCC also accommodated other attendees with scheduling conflicts.⁵⁵ One MAPCC Commissioner stated that the MAPCC was “in the business of listening to the public,” and that it “typically went out of [its] way to try to listen to people who had taken the time to appear before the Commission.”⁵⁶

During the December 1, 1992 meeting in Lansing, the MAPCC considered three permits in addition to other five agenda items. In addition to GPS, there were permit hearings scheduled related to two proposed facilities in Marquette County, one in Sands Township and one in

⁴⁶ Letter from Lynn Fiedler, Permit Section Supervisor, MDNR/MDEQ to “Interested Party”, Dec. 7, 1992 at 1.

⁴⁷ MAPCC Meeting Minutes, Lansing, Mich. (Oct. 27, 1992) at 5.

⁴⁸ *Id.*

⁴⁹ *Id.* See also, Transcript of MAPCC Meeting, October 27, 1992, Lansing, Michigan, at 174.

⁵⁰ Transcript of MAPCC Meeting, October 27, 1992, Lansing, Michigan, at 174-79.

⁵¹ MAPCC Meeting Minutes, Lansing, Mich. (Oct. 27, 1992) at 7. The extended comment period closed on November 17, 1992, providing a total written comment period of 42 days.

⁵² Meeting Agenda, Michigan Air Pollution Control Commission, December 1, 1992.

⁵³ Interview of former MAPCC Commissioner A (Mar. 26, 1999); Interview of MDNR/AQD Employee A at 20 (Mar. 26, 1999).

⁵⁴ Interview of former Chairman of the MAPCC (Mar. 25, 1999).

⁵⁵ Interview of former MAPCC Commissioner B at 11 (Aug. 14, 1997) (accommodations were regularly made for persons with scheduling conflicts).

⁵⁶ Interview of former MAPCC Commissioner A at 6 (Mar. 26, 1999).

Skandia.⁵⁷ The GPS permit hearing was the 7th item on the agenda. The MAPCC began its meeting around 9:00 am. At 9:30 a.m. the MAPCC started the first scheduled public hearing for the Marquette County Solid Waste Management Authority. By 11:45 a.m., only 3 people had commented on this permit application.⁵⁸ The Chairman of the MAPCC indicated that the MAPCC would break for lunch, but that before it did so, Dr. Robert Soderstrom would speak on the GPS permit application because he had a scheduling conflict and had to leave.⁵⁹ Dr. Robert Soderstrom, from the Genesee Medical Society, who is White, then spoke.⁶⁰

State Representative Floyd Clack and Ms. Janice O'Neal, both of whom are African American, each asked to address the MAPCC in advance of the GPS hearing because of scheduling conflicts created by the delay of the hearing.⁶¹ Neither request was granted. Ms. O'Neal provided her oral comments at the GPS hearing later that evening after traveling 120 miles to Flint and back.⁶² Ms. Bogardus, who is White, interrupted the MAPCC as they deliberated about whether to postpone the GPS hearing.⁶³ She did not ask permission to speak in advance of the GPS hearing. She interrupted the Commissioners and was allowed to proceed with her remarks.⁶⁴

The MAPCC deviated from what was described as its standard operating procedures for handling requests to speak in advance of the public comment period resulting in African Americans' requests being denied while requests by Whites to speak in advance were granted.

MDEQ has subsequently implemented policy and guidance that may reduce the likelihood that a hearing would run late into the night (*e.g.*, limiting the agenda to only one permit, time limits on speakers). However, no information was provided on how MDEQ would evaluate requests to speak in advance or other requests for special accommodations. EPA reviewed current public involvement policy, guidance, and procedures provided by MDEQ on November 7, 2016 to determine whether they provide sufficient safeguards to ensure similar incidents would not occur today.

ii. Limiting time to review permit materials and provide comments.

⁵⁷ MAPCC Meeting Minutes, Lansing, Mich. (Dec. 1, 1992) at 4, 7-8.

⁵⁸ *Id.*, at 5.

⁵⁹ See MAPCC Meeting Minutes, Lansing, Mich. (Dec. 1, 1992) at 5, and Transcript of MAPCC Meeting, December 1, 1992, Part 1, Lansing, Michigan, at 2. Chairman stated: "At this point, I would like to deviate from the agenda for just a moment. We have had a request prior to this time from the Genesee County Medical Society that we permit Dr. Soderstrom to speak on Item 7 on the agenda, as he has to leave at noon. So would Dr. Soderstrom please come up?"

⁶⁰ MAPCC Meeting Minutes, Lansing, Mich. (Dec. 1, 1992) at 5; Transcript of MAPCC Meeting, December 1, 1992, Part 1, Lansing, Michigan, at 2-8; Audio Tape Recording of MAPCC Meeting, December 1, 1992, Tape 2, Side B at 2:38 – 10:38.

⁶¹ Interview of Witness A. (Sept. 29, 1998).

⁶² Interview of Witness B (Apr. 6, 1999).

⁶³ MAPCC Meeting Minutes, Lansing, Mich. (Dec. 1, 1992) at 8; Transcript of MAPCC Meeting, December 1, 1992, Part 1, Lansing, Michigan, at 14-15. See also Audio Tape Recording of MAPCC Meeting, December 1, 1992, Tape 5, Side A.

⁶⁴ Transcript of MAPCC Meeting, December 1, 1992, Part 1, Lansing, Michigan, at 15. See also Audio Tape Recording of MAPCC Meeting, December 1, 1992, Tape 5, Side A.

At about 2:10 p.m., MDEQ staff provided the public a limited number of copies of the revised GPS Draft Permit and accompanying Staff Activity Report Addendum (SAR Addendum) and their attachments.⁶⁵ The 26 page SAR Addendum stated that in response to the comments and additional information, MDEQ summarized the results of technical studies analyzing wood waste emissions from other wood waste boilers;⁶⁶ included a revised BACT analysis for air toxics; “performed an additional analysis of the worst case emissions from the proposed facility;” and “made numerous changes” to permit conditions in the October 5, 1992 Draft Permit.⁶⁷ An MDEQ employee acknowledged its lateness, but explained MDEQ “felt it needed to be done as best as possible in order to lay out the facts.”⁶⁸

Some people were given the full report, while others were given only a handout summarizing the major changes to the original permit.⁶⁹ Hearing attendees had less than 5 hours to review the changes to the proposed permit conditions and to develop meaningful questions and comments for the Commissioners and MDEQ staff before the GPS hearing began. At the beginning of the GPS hearing that evening, an MDEQ employee announced additional copies of the SAR were available for those who did not receive them earlier.⁷⁰ While it appears more SARs were made available at the beginning of the GPS hearing, it is unclear whether all those present were provided their own copy.

The GPS hearing began at about 6:40 p.m. with public comment commencing at about 8:40 p.m.⁷¹ Community members interested in providing comments to the MAPCC were given their opportunity more than 11 hours after they had arrived from Flint and the MAPCC meeting had begun. The length of time before the GPS hearing began was irregular for the MAPCC, as most MAPCC meetings had concluded or were wrapping up in the early evening.⁷² At no other hearing held in 1992 were community members required to wait 9 hours before their hearing started and 11 hours before they were allowed to provide comment. The GPS public hearing lasted almost 6 hours.⁷³

⁶⁵ Transcript of MAPCC Meeting, December 1, 1992, Part 1, Lansing, Michigan, at 11, 22. MDEQ staff acknowledged that the initial amount of copies provided was limited when they offered copies to those who “did not get a copy of the staff report early this afternoon.”

⁶⁶ MDEQ AQD Staff Activity Report, December 1, 1992, at 5-9.

⁶⁷ MDNR, Staff Activity Report Addendum at 9 (Dec. 1, 1992) (Conclusion). The Renewable Operating Permit for GPS (Permit # 199600357) cites the new air toxics rules, but does not include an additional analysis of air toxics or a change in emissions limits. MDEQ, Staff Report Addendum (Aug. 16, 2000).

⁶⁸ Transcript of MAPCC Meeting, December 1, 1992, Part 1, Lansing, Michigan, at 21.

⁶⁹ *Id.*

⁷⁰ Transcript of MAPCC Meeting, December 1, 1992, Part 1, Lansing, Michigan, at 22.

⁷¹ See EPA Chronology of Events for Dec. 1, 1992 MAPCC Meeting.

⁷² According to former a MAPCC Commissioner public hearings typically began and ended during “normal business hours.” See Interview with former MAPCC Commissioner A at 7 (Mar. 26, 1999); Interview with former MAPCC Commissioner B at 7 (Mar. 30, 1999) (stating that an MAPCC meeting that continued beyond 9:00 p.m. was “fairly unusual”). However, according to an MDEQ official, there was really no “normal time” for a hearing to begin or end because meeting agendas varied so much from month to month. “Sometimes the agenda was relatively short, so the meeting was over in a few hours. Other times there would be many items on the agenda, and the hearings went well into the night.” See Interview of MDNR/AQD Employee A at 21 (Mar. 26, 1999).

⁷³ See EPA Chronology of Events for Dec. 1, 1992 MAPCC Meeting.

The MAPCC considered a proposal to postpone the GPS permit hearing.⁷⁴ One Commissioner suggested having a meeting in Flint and recognized that Flint residents had to come to Lansing twice, stating the MAPCC has “been so rude to those people, prolonging the meeting, dragging them out, . . . it’s going to be late at night, they have to get home to their children . . .”⁷⁵ Another Commissioner agreed a meeting in Flint might be a good alternative to going “way beyond 5 o’clock” and the Commissioner did not think knowing some of the residents that they could do that.⁷⁶

MDEQ stated that it provided 10 hours of public hearings and 42 days of public comment for this permit.⁷⁷ While the number of days for written comments exceeds regulatory requirements, it is not relevant when the issue is the amount of time to read, analyze, and develop comments on the considerable new information presented on December 1, 1992. Because the hearing was not postponed, the oral comment period at the December 1 hearing was the only opportunity the Flint community had to provide comment on the new items introduced that afternoon. No additional written comment period was given because the GPS permit was approved immediately after the oral comment period ended that night. If any members of the public needed more time to read and digest the new materials to prepare comments or were not available to provide oral comment to the MAPCC that evening, there was no other opportunity to provide comment on the new information.

MDEQ also stated that there were various informal opportunities for the public to learn about the project, including articles in the local newspaper published before the start of the comment period, meetings sponsored by Genesee Township, a Genesee County Health Department meeting, a neighborhood coalition meeting, and a GPSLP-sponsored tour of a similar facility in Grayling, Michigan.⁷⁸ While all of these types of meetings may be a good source of information for the residents, they are not relevant to the issues raised by the complainants about their ability to comment on the revised permit conditions presented on December 1st or the analysis supporting those conditions.

The MAPCC had the discretion to postpone the December 1992 hearing and/or extend the comment period. The decision to continue the hearing into the night and to issue the permit without allowing time for those at the hearing to review and prepare comments on new permit conditions, new analyses, and other information resulted in the commenters from the predominantly African American community being treated less favorably than people at other permit hearings for facilities in predominantly non-African American communities.

MDEQ has implemented procedures and guidance designed to prevent hearings that would require commenters to wait over 10 hours to provide their comments (*e.g.*, generally scheduling only one permit hearing; initially limiting commenters to 5 minutes with an opportunity to

⁷⁴ MAPCC Meeting Minutes, Lansing, Mich. (Dec. 1, 1992) at 8; Transcript of MAPCC Meeting, December 1, 1992, Part 1, Lansing, Michigan, at 8-9.

⁷⁵ Audio Tape Recording of MAPCC Meeting, December 1, 1992, Tape 4, Side A at 15:45-17:25.

⁷⁶ Audio Tape Recording of MAPCC Meeting, December 1, 1992, Tape 4, Side A at 15:45-17:25.

⁷⁷ Letter from Leslie K. Bender, Legislative Liaison, MDNR to Mike Mattheisen, *OCR, US EPA 2 (June 29, 1995)* at 2, 4, 6. MDEQ noted that the October 27, 1992 GPS hearing lasted approximately 4.5 hours, and that the December 1, 1992 GPS hearing lasted approximately 5.5 hours. *Id.* at 4.

⁷⁸ *Id.* at 2-3.

provide additional comments after everyone has had their turn). Also, MDEQ continues to provide a process for extending a public comment period upon written request.⁷⁹

These changes may address some of the causes that contributed to the residents of the African American community having to stay at the hearing in Lansing well after midnight. However, no information was provided on how MDEQ would evaluate requests to postpone hearings or extend the public comment period.

iii. Consideration of Community Siting Concerns and Opposition

At the December 1, 1992 meeting, in addition to the GPS permit, the MAPCC also considered the permit application for the Contaminated Soil Recycling facility proposed in Skandia. Skandia is a predominantly White community in Marquette County, Michigan.⁸⁰ Residents of both the Flint⁸¹ and Skandia⁸² communities expressed significant community opposition to the permits.

The transcript of the December 1-2, 1992 hearing contain discussions that indicate that at least one MAPCC Commissioner considered community opposition during his deliberations over issuance of the Skandia permit.⁸³

In response to the allegation, MDEQ stated that the MAPCC followed proper procedures in the GPS permit hearing.⁸⁴ Regarding the role of community opposition in the Contaminated Soil Recycling decision, MDEQ stated that the MAPCC had a legal obligation to approve any permit application meeting applicable state and federal air pollution regulations.⁸⁵ MDEQ stated that these air pollution regulations were not met in the Contaminated Soil Recycling decision.⁸⁶

⁷⁹ *A Citizen's Guide to Participation in Michigan's Air Pollution Control Program*, (April 2007) at 12.

⁸⁰ 1990 Census of Population and Data Public Law 41-171 Data.

⁸¹ At the October 27, 1992 hearing, eight people representing different community groups or themselves, spoke in opposition to the proposed GPS permit. The commenters "expressed concerns regarding: no guarantee that clean wood would be burned; contamination to the Flint River; existing odors from junkyards burning tires, asphalt plants, cement plants, and Buick; children and senior citizens with respiratory problems; high cancer rate and infant mortality; and environmental racism and economic discrimination." MAPCC Meeting Minutes, Lansing, Mich. (Oct. 27, 1992) at 5. A petition was submitted with 350 signatures opposed to the GPS permit being issued.

⁸² MDEQ staff reported that "the proposed facility will likely comply with all applicable state and federal air quality regulations; however, there is an unresolved local construction permit issue and significant public controversy." *Id.*, at 7. Thirteen individuals spoke opposing the Contaminated Soil Recycling, Inc. facility and "a petition with 560 signatures of opposed to the site location was submitted. . . . Some commenters expressed health concerns which may be exacerbated by the proposed incinerator." *Id.*, at 8.

⁸³ Transcript of MAPCC Meeting, December 1, 1992, Part 2, Lansing, Michigan, pp. 1-3. One Commissioner stated he would take into account the people who were most impacted and if the public tells him they would rather the MAPCC not approve it, it affects his decision. He further stated that he intended "to take the public into my consideration, and because of its poor siting, and because I think the citizens do feel that there's going to be an impact, I'm not going to approve it." Transcript of MAPCC Meeting, December 1, 1992, Part 2, Lansing, Michigan, at 3.

⁸⁴ Letter from Leslie K. Bender, Legislative Liaison, MDNR to Mike Mattheisen, OCR, US EPA (June 29, 1995) at 4.

⁸⁵ *Id.*, at 3.

⁸⁶ MAPCC Meeting Minutes, Lansing, Mich. (Dec. 1, 1992) at 9.

If considering community opposition was proper procedures, then it appears the MAPCC followed them for Contaminated Soil Recycling, but not for GPS. If MDEQ is saying that the MAPCC followed proper procedures by denying the Contaminated Soil Recycling permit because it did not meet regulatory requirements, the transcript of the hearing indicates that the MAPCC was trying to determine what they would consider in making their decision. The fact that the result of the hearing was the correct result under the environmental regulations, does not change the concerns with regard to the process that was used in one instance and not the other.

MDEQ's 2014 Public Involvement Handbook contains a very short discussion of public involvement in permitting decisions states: "The fact that a community or individual simply does not want a proposed facility in their community is generally not a factor that can be considered by the DEQ in reaching a decision on a proposed permit. Local governmental officials may have authority to consider local preferences when making zoning decisions."⁸⁷ So it appears MDEQ has implemented guidance that ensures that when it comes to community opposition, all communities will be treated equally, in that their oppositions will not be considered in the decision-making process.

b. October 20, 1994 Hearing

In October 1993, EPA's Environmental Appeals Board (EAB)⁸⁸ had upheld the validity of the GPS permit, but asked the MDEQ to consider whether fuel cleaning ("the removal of wood painted or treated with lead-bearing substances") for the wood that would be burned in the facility constituted the Best Available Control Technology (BACT) for lead emissions.⁸⁹ On November 18, 1993, MDEQ announced a public comment period and scheduled a hearing for the reconsideration of BACT for lead. On December 21, 1993, the MDEQ held a hearing to discuss fuel cleaning for the GPS facility⁹⁰ in Genesee Township, Michigan. Kearsley High School is approximately five miles from the proposed GPS facility in predominantly White Genesee Township, Michigan.⁹¹

i. Armed and uniformed officers at hearing.

On October 20, 1994, MDEQ held a hearing at the Carpenter Road School, in a predominantly African American neighborhood bordering the GPS facility⁹² in Flint, to receive public comment on the proposed Wood Waste Plan.⁹³ This was the last hearing before GPS would begin normal operation. This was the second GPS public hearing held outside of Lansing and the first to take place in the predominantly African American neighborhood. Two uniformed and

⁸⁷ MDEQ's *Public Involvement Handbook, A Citizen's Guide* (January 2014) p. 16.

⁸⁸ Audio Tape Recording of MDNR Meeting. December 21, 1993, Tape 1 Side A, at 3:10-3:18.

⁸⁹ *Id.*, at 3:18-3:40. See also *In the Matter of Genesee Power Station*, E.A.B., PSD Appeal Nos. 93-1 through 93-7 (Oct. 22, 1993) at 43.

⁹⁰ *Id.*, at 0:20-3:10.

⁹¹ Brown Longitudinal Tract Database (LTDB) based on decennial census data, 2000 & 1990 as presented in the U.S. Department of Housing and Urban Development's AFFH Data and Mapping Tool.

⁹² Brown Longitudinal Tract Database (LTDB) based on decennial census data, 2000 & 1990 as presented in the U.S. Department of Housing and Urban Development's AFFH Data and Mapping Tool.

⁹³ Transcript of Meeting, MDNR, AQD, October 20, 1994, Flint, Michigan, at 2-3. See Interview with MDNR/AQD Staff A at 35 (Mar. 26, 1999).

armed MDEQ Conservation Officers attended the hearing at the request of the MDEQ.⁹⁴ The first two GPS public hearings had been held in Lansing without armed uniformed officers present at the doors of the hearing.⁹⁵

The Law Enforcement Division, for whom the conservation officers work, did not have any written policy on the use of armed and uniformed officers at hearings. In response to the question of why the armed and uniformed officers were present at the Carpenter Road hearing, Michigan state agencies gave a variety of answers. The Law Enforcement Division stated that upon request, conservation officers were typically assigned to state government real estate sales (strong box security) and other public meetings where it was anticipated that personnel safety may be a concern due to the controversial nature of an issue.⁹⁶ Both of the officers at the Carpenter Road hearing stated they had been assigned to guard hearings before, but according to both the officers and other MDEQ staff having guards at MDEQ meetings was not a frequent occurrence and only occurred when the MDEQ anticipated popular disapproval of MDEQ actions.⁹⁷

There was no strong box to guard at the GPS hearing. There is no persuasive evidence in the record that personnel safety may have been a concern due to the controversial nature of an issue. The state office for whom the conservation officers worked had no record of a request for the presence of armed uniformed officers that might contain an explanation for their presence. Neither of the two Conservation Officers who were present at that GPS hearing recalled being briefed regarding the reason that their presence was required.⁹⁸

In 1999, MDEQ stated that no complaints had been filed regarding the presence of conservation officers at public hearings or meetings since 1994.⁹⁹ MDEQ stated that it has held public hearings and meetings in the local affected communities without incident, and that many of these meetings were conducted in inner-city communities.¹⁰⁰ MDEQ's recent response¹⁰¹ describes a number of reasons, including some not mentioned in 1999, why armed and uniformed officers might be present at hearings and indicates that depending on the circumstances, there are several different types of officers that might be present.

⁹⁴ Interview with MDNR/MDEQ Employee B at 38 (Mar. 26, 1999) (statement confirming that there were 2 MDEQ Conservation Officers present at the October 20, 1994 hearing).

⁹⁵ Group Interview of Complainants (Sept. 29, 1998).

⁹⁶ Letter from Todd B. Adams, Assistant Attorney General, Natural Resources Division, Department of Attorney General, Michigan, to Ann Goode, Director, Office of Civil Rights, US EPA, Response to Question 2 (July 28, 1999).

⁹⁷ See Interview of MDNR/MDEQ Conservation Officer A (May. 17, 1999); Interview of MDNR/MDEQ Conservation Officer B (May. 17, 1999); See also Interview with MDNR/AQD Staff A, (Mar. 26, 1999) at 29-32

⁹⁸ Interview of MDNR/MDEQ Conservation Officer A, (May. 17, 1999); Interview of MDNR/MDEQ Conservation Officer B (May. 17, 1999);

⁹⁹ Letter from Todd B. Adams, Assistant Attorney General, Natural Resources Division, Department of Attorney General, Michigan, to Ann Goode, Director, Office of Civil Rights, US EPA, Response to Question 2 (July 28, 1999).

¹⁰⁰ *Id.*

¹⁰¹ Letter from John Fordell Leone, Assistant Attorney General, Environment, Natural Resources, and Agriculture Division, Michigan Department of Attorney General, to Velveta Golightly-Howell, Director, Office of Civil Rights, US EPA (Nov. 6, 2015) at page 7.

At the time, the use of armed and uniformed officers was uncommon and appears to have only happened at the hearing held in the African American community. In evaluating the use of armed and uniformed officers in this situation, EPA considered the intimidation factor through threat of police force as historically used against African Americans when attempting to exercise their rights.

Without any credible explanation, MDEQ deviated from its stated policy at the time by placing the armed and uniformed guards at the GPS hearing in Flint. MDEQ has not provided a copy of any current policies that apply to the use of armed and uniformed officers at hearings or the criteria used to evaluate whether and when certain types of officers should be used (e.g., plain clothes, armed and uniformed police, conservation officers).

ii. Close of hearing during testimony

MDEQ adjourned the October 20, 1994 hearing during the testimony of an African American speaker and before everyone had been given a chance to testify.

The decision to adjourn the hearing surprised MDEQ staff.¹⁰² MDEQ staff stated that, before its adjournment, the October 20, 1994 hearing was not atypically controversial or heated, nor was the audience disorderly. MDEQ staff members stated that the audience at Carpenter Road Elementary was no more emotional than audiences at other hearings that had not been adjourned.¹⁰³ One MDEQ employee stated that she had never seen any hearing adjourned before all of the commenters were allowed to speak.¹⁰⁴

In addition, another witness who attended most of the air permit hearings held in Michigan from 1990 to 1996 stated that he had never seen the MDEQ adjourn a hearing as it did at the October 20, 1994 GPS hearing. The witness stated that commenters at other hearings had made comments similar to Ms. O'Neal's, but the MDEQ had never adjourned a hearing because of it.¹⁰⁵

The evidence shows that Ms. O'Neal, an African American, was treated less favorably than all other commenters at any MDEQ hearing in anyone's memory. In addition, the witnesses say that to their knowledge the first time, and for some who attended many hearings afterward the only time, a hearing was closed before all commenters could speak was when it was held in the African American community in Flint.

MDEQ did not provide any current information or decision criteria to address whether and when a current hearing might be closed before all those wishing to speak were able to provide comments.

¹⁰² Interview with MDNR/MDEQ Employee B at 38 (Mar. 26, 1999). Interview with MDNR/AQD Employee A. at 34 (Mar. 26, 1999).

¹⁰³ Interview with MDNR/MDEQ Employee B at 38 (Mar. 26, 1999). Interview with MDNR/AQD Employee A. at 34 (Mar. 26, 1999).

¹⁰⁴ Interview with MDNR/MDEQ Employee B at 43-45 (Mar. 26, 1999).

¹⁰⁵ Interview with Witness C (Mar. 19, 1999).

The remaining people signed up to present comments who had not yet been called were unable to provide their testimony to the MDEQ at that hearing.¹⁰⁶ Unidentified persons in the audience then began calling out comments such as: "We want to hear what she has to . . ."; and "That's not fair."¹⁰⁷ MDEQ contacted the three people who had been prevented from testifying at that hearing and asked them to submit their written comments to MDEQ.¹⁰⁸ However, one of those commenters stated that written testimony would have been inadequate because she had visual aids for her presentation. On December 22, 1994, MDEQ held a special hearing in order to allow the commenter to make her presentation.¹⁰⁹ On January 12, 1995, MDEQ issued a supplement to the permit requiring revisions, clarifications, and modifications in the Wood Waste Plan.¹¹⁰

3. Conclusion

Flint, the community that borders that GPS facility, was and continues to be predominantly African American. Both individually and as a community, African Americans were subjected to adverse actions by the MAPCC or MDEQ, while similarly situated, non-African Americans and non-African American communities were not subjected to the same adverse actions.

During that time period, the MAPCC and MDEQ had written no formalized operating procedures for conducting its meetings or hearings. However, there were a series of unwritten standard operating procedures that EPA was told existed or that could be discerned from hearing records. The MAPCC deviated from those standard operating procedures on more than one occasion to the detriment of African Americans. For example, the MAPCC stated it had a standard operating procedure for handling requests to speak in advance of a hearing. The MAPCC's deviation from the stated standard operating procedure resulted in one African American commenter not being able to provide his comments while another African American commenter was forced to drive back to Flint only to return to the hearing later that night to provide her comments.

Regardless of whether it was appropriate for the MAPCC Commissioners to consider community opposition in their votes, the record supports a finding that one Commissioner did consider it in casting his vote for one permit before the MAPCC on December 1, 1992. Both the White community of Skandia and the African American community of Flint expressed significant opposition to the MAPCC granting a permit to operate the proposed facilities. MAPCC decisions that day granted the White community's request, while that of the African American community was denied. In addition, it appears from MDEQ's response that community opposition was not one of the factors the MAPCC was to consider in its decision. If that is the case, then in addition to weighing consideration of community opposition differently, this Commissioner deviated from that policy of not considering community opposition.

¹⁰⁶ Transcript of Meeting, MDNR, AQD, October 20, 1994, Flint, Michigan, at 129-130, *See also* Audio Tape Recording of MDNR Meeting, December 22, 1994, Tape 1 Side A, at 1:50-2:20.

¹⁰⁷ Audio Tape Recording of MDNR Meeting, October 20, 1994, Tape 3, Side A.

¹⁰⁸ Audio Tape Recording of MDNR Meeting, December 22, 1994, Tape 1 Side A, at 1:50-2:20.

¹⁰⁹ *Id.*, at 0:00 -3:00.

¹¹⁰ Letter from Russell Harding, Deputy Director, MDNR to A. Sarkar, Jan. 12, 1995 at 1-2.

Moreover, MDEQ deviated from the stated policy for the assignment of armed and uniformed guards and assigned them to the GPS hearing in Flint. In light of the rarity at the time of the use of the armed and uniformed officers; no apparent or articulated need for their presence; and the commonly known historical use of threat of police force to intimidate African Americans who attempt to exercise their civil rights, this use of the officers is yet another example of how the African American community was treated less favorably than White communities who sought to exercise their rights at permit hearings.

The closing of the final GPS hearing held in Flint during the comments of an African American commenter and before all the commenters who signed up could speak was a deviation from the standard operating procedures that all of the witnesses there had experienced.

The totality of the circumstances described above supported by a preponderance of the evidence in EPA's record would lead a reasonable person to conclude that race discrimination was more likely than not the reason why African Americans were treated less favorably than non-African Americans during the 1992-1994 public participation for the GPS permit.

In addition, as will be discussed later in this letter, EPA has significant concerns about MDEQ's current public participation program and whether MDEQ can ensure that these instances of discriminatory treatment would not occur today. In particular, EPA notes that there is no guidance or neutral criteria for MDEQ staff to follow should they encounter the same or similar decisional processes related to the disparate treatment at issue in this case.

Issue 2: Health Impacts

In response to allegations raised by the Complainants, EPA investigated whether African Americans would be subjected to adverse disparate health impacts from air pollution emissions from (1) GPS and similar statewide sources; (2) GPS added to the existing cumulative air pollution in Genesee County; and (3) GPS by itself.

1. Legal Standard

This issue is being analyzed under a *disparate impact* or *discriminatory effects* standard.¹¹¹ As noted previously, EPA and other federal agencies are authorized to enact regulations to achieve the law's objectives in prohibiting discrimination. For example, EPA regulations state:

¹¹¹ *Guardians*, 463 U.S. at 582; *Alexander v. Choate*, 469 U.S. at 293. Many subsequent cases have also recognized the validity of Title VI disparate impact claims. See *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995); *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988); *Gomez v. Illinois State Bd. Of Educ.*, 811 F.2d 1030 (7th Cir. 1987); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984). *United States v. Maricopa Cty.*, 915 F. Supp. 2d 1073, 1081 (D. Ariz. 2012) (plaintiff properly stated a disparate impact claim where limited-English proficient Latino inmates had diminished access to jail services such as sanitary needs, food, clothing, legal information, and religious services). In addition, by memorandum dated July 14, 1994, the Attorney General directed the Heads of Departments and Agencies to "ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of [f]ederally financed programs." Attorney General Memorandum on the use of the Disparate Impact Standard in Administrative Regulations under Title VI of the Civil Rights Act of 1964 (July 14, 1994)

A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination. ...¹¹²

In a disparate impact case, EPA must determine whether the recipient uses a facially neutral policy or practice that has a sufficiently adverse (harmful) and disproportionate effect based on race, color, or national origin. This is referred to as the prima facie case. To establish an adverse disparate impact, EPA must:

- (1) identify the specific policy or practice at issue;
- (2) establish adversity/harm;¹¹³
- (3) establish disparity;¹¹⁴ and
- (4) establish causation.¹¹⁵

The focus here is on the consequences of the recipient's policies or decisions, rather than the recipient's intent.¹¹⁶ The neutral policy or decision at issue need not be limited to one that a recipient formalizes in writing, but also could be one that is understood as "standard operating procedure" by recipient's employees.¹¹⁷ Similarly, the neutral practice need not be affirmatively undertaken, but in some instances could be the failure to take action, or to adopt an important policy.¹¹⁸

If the evidence establishes a prima facie case of adverse disparate impact, as discussed above, EPA must then determine whether the recipient has articulated a "substantial legitimate justification" for the challenged policy or practice.¹¹⁹ "Substantial legitimate justification" in a

(<http://www.justice.gov/ag/attorney-general-july-14-1994-memorandum-use-disparate-impact-standard-administrative-regulations>).

¹¹² 40 C.F.R. § 7.35(b).

¹¹³ Adversity exists if a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm.

¹¹⁴ In analyzing disparity, EPA analyzes whether a disproportionate share of the adversity/harm is borne by individuals based on their race, color, national origin, age, disability or sex. A general measure of disparity compares the proportion of persons in the protected class who are adversely affected by the challenged policy or decision and the proportion of persons not in the protected class who are adversely affected. See *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576-77 (2d Cir. 2003). When demonstrating disparity using statistics, the disparity must be statistically significant.

¹¹⁵ See *N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities").

¹¹⁶ *Lau v. Nichols*, 414 U.S. 563, at 568 (1974).

¹¹⁷ If as part of a recipient's permitting of a facility, a recipient makes a decision with respect to the siting of a facility; such decision may not intentionally discriminate or have a discriminatory effect on a protected population. The regulation states:

A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart. 40 C.F.R. § 7.35(c).

¹¹⁸ See, e.g., *Maricopa Cty.*, 915 F. Supp. 2d at 1079 (disparate impact violation based on national origin properly alleged where recipient "failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services" and discriminatory conduct of detention officers was facilitated by "broad, unfettered discretion and lack of training and oversight" resulting in denial of access to important services).

¹¹⁹ *Georgia State Conf. v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).

disparate impact case, is similar to the Title VII employment concept of “business necessity,” which in that context requires a showing that the policy or practice in question is demonstrably related to a significant, legitimate employment goal.¹²⁰ The analysis requires balancing recipients’ interests in implementing their policies with the substantial public interest in preventing discrimination.

If a recipient shows a “substantial legitimate justification” for its policy or decision, EPA must also determine whether there are any comparably effective alternative practices that would result in less adverse impact. In other words, are there “less discriminatory alternatives?”¹²¹ Thus, even if a recipient demonstrates a “substantial legitimate justification,” the challenged policy or decision will nevertheless violate federal civil rights laws if the evidence shows that “less discriminatory alternatives” exist.

2. Analysis

After reviewing relevant information in the record, EPA determined that in order to answer the question of whether there would be adverse health effects from the site-related pollutants of air toxics and lead, more information was necessary. Therefore, in the early 2000s, EPA conducted its own modeling and analyses¹²² of health impacts from air emissions assuming a 30-year exposure period that included:

- Lead emissions from GPS¹²³
- Cumulative countywide direct inhalation air toxics from point sources county-wide including GPS emissions (*County-wide Air Toxics Study*)¹²⁴
- Air toxics emissions from GPS and similar facilities statewide (*Statewide Risk Assessment*)¹²⁵
- Air toxics emissions from the GPS facility alone.

EPA used the best available emissions inventory information and best available risk assessment tools. EPA’s assessments sought to represent assessments that could have been conducted by MDEQ at the time the permit was issued.

¹²⁰ *Wards Cove Packing Inc. v. Antonio*, 490 U.S. 642, 659 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-36 (1971). Notably, the concept of “business necessity” does not transfer exactly to the Title VI context because “business necessity” does not cover the full scope of recipient practices that Title VI covers, which applies far more broadly to many types of public and non-profit entities. See *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2522-24 (2015) (recognizing the limitations on extension of the business necessity concept to Fair Housing Act complaints).

¹²¹ *Elston*, 997 F.2d at 1407.

¹²² No independent data collection such as air or soil sampling was conducted for any of the assessments – instead, the analyses were based on modeling of available facility data.

¹²³ *Assessment of Lead Exposures and Human Health Impacts Related to Emissions of the Genesee Power Station*, EPA Region 5, (February, 2003).

¹²⁴ *Genesee Power Station Point Source Impact Assessment*, Office of Research and Development, National Center for Exposure Assessment, (May, 2005).

¹²⁵ *Risk Assessment of Selected Municipal Waste Combustors and Wood Waste Boilers in the State of Michigan*, U.S. EPA Region 5 (January, 2001).

When assessing residual risk from air toxics under the CAA for source categories that are subject to technology-based requirements,¹²⁶ EPA generally seeks to prevent cancer risks in excess of 10^{-4} , may address cancer risk in excess of 10^{-6} , and generally seeks to prevent noncarcinogenic impacts that exceed a hazard quotient or hazard index of 1.¹²⁷ When conducting the *Update*, EPA used the two step residual risk assessment process which culminates with an “ample margin of safety” determination to determine adversity/harm under the Title VI adverse disparate impact analysis.

Where a cancer risk was found above 10^{-6} or a hazard index above 1.0 in the *County-wide Air Toxics Study* and the *Statewide Risk Assessment*, EPA completed an update to include additional information about key assumptions available at the time of the permit issuance and about more current conditions (e.g., facility closures, regulatory changes, reviewing emissions data concerns) (*2014 Update Analysis*).¹²⁸

The basis for EPA’s determination is that with one exception (i.e., locally-caught fish consumption exposure scenario for air toxics), the risk of health effects created in whole or in part by GPS emissions either at the time of the permitting or under current conditions are not above adversity benchmarks generally warranting remedial action (i.e., 10^{-4} or HI of 1.0). EPA’s update found the risk of health effects for fish consumption to be below these adversity benchmarks.

a. Criteria Air Pollutants

EPA considered the information provided by Complainants, including the information pertinent to whether the air quality in the area in question attained the National Ambient Air Quality Standards (NAAQS). EPA also examined whether site-specific information demonstrates the presence of adverse health effects from the NAAQS pollutants, even though the area is

¹²⁶ Under CAA section 112(d), EPA establishes technology-based requirements for certain source categories of air toxics. EPA subsequently reviews these standards to focus on reducing any remaining risk that the source category may pose, a process called residual risk assessment. This process is followed to determine if a source category meets acceptable levels of cancer risk and noncancer hazard. This may include evaluation of pathways and exposure routes including inhalation and ingestion (e.g., fish consumption).

¹²⁷ As explained in EPA’s Residual Risk Report to Congress (1999, at http://www.epa.gov/airtoxics/risk/risk_rep.pdf) on page ES-10:

“For public health risk management decision-making in the residual risk program, EPA considers the two-step process culminating with an “ample margin of safety” determination, as established in the 1989 benzene NESHAP and endorsed by Congress in the 1990 CAA Amendments as a reasonable approach. In the first step, a “safe” or “acceptable risk” level is established considering all health information including risk estimation uncertainty. As stated in the preamble to the rule for benzene, which is a linear carcinogen (i.e., a carcinogen for which cancer risk is believed or assumed to vary linearly with exposure), “an MIR (maximum individual risk) of approximately 1 in 10 thousand should ordinarily be the upper-end of the range of acceptability.” In the second step, an emission standard is set that provides an “ample margin of safety” to protect public health, considering all health information including the number of persons at risk levels higher than approximately 1 in 1 million, as well as other relevant factors including costs, economic impacts, technological feasibility, and any other relevant factors.”

¹²⁸ *Genesee Power Station Technical Assessment Update*, US EPA Region 5, (August 2014). EPA completed an update in 2014; the review, including the update, did not identify adverse impacts from pollutants, and EPA terminated its review of impacts at this time.

designated attainment for all such pollutants and the facility recently obtained a construction and operating permit that ostensibly meets applicable requirements.

At the time of GPS permit issuance and currently, Genesee County was in attainment status for the National Ambient Air Quality Standard (NAAQS) for ozone and remains so.¹²⁹

EPA's investigation did not find any other readily available, site specific information demonstrating the presence of an adverse health effect from ozone.

i. Lead Emissions

At the time of GPS permit issuance, Genesee County was monitoring attainment of the NAAQS for lead, and is currently in attainment with the NAAQS for lead.¹³⁰ The Complainants provided information that indicated presence of an adverse impact from lead despite the designation of attainment. Therefore, EPA performed a lead health risk assessment which found:

- 1) no significant increases in the estimated hypothetical children's blood lead levels;
- 2) no increase in blood lead levels for children whose pre-existing blood lead levels may be elevated from exposure to higher existing soil or dust lead concentrations; and
- 3) predicted incremental increases to soil and dust lead levels from GPS lead emissions were sufficiently low that they would be undetectable using conventional sampling and analytical procedures.

b. Air Toxics

EPA completed two risk assessment that evaluated the potential cancer risk and non-cancer hazard from various point sources of air toxics. In 2001, EPA completed a risk assessment of nine wood waste boilers (WWBs) and municipal waste combustors (MWCs) that were comparable to GPS and operating in Michigan at the time of the permitting of GPS.¹³¹ This *Statewide Risk Assessment* looked at both the direct inhalation pathway and the indirect exposure pathways of: (1) garden soil and produce ingestion and (2) high end fish consumption (higher than average, but not subsistence-level consumption).

In 2005, EPA completed the *County-wide Air Toxics Study*,¹³² a risk assessment that estimated potential health impacts from direct inhalation of emissions of both airborne carcinogens and non-carcinogens for four different exposure scenarios: (1) impacts of GPS emissions on an area

¹²⁹ Genesee County is currently in attainment for all NAAQS. See http://www.epa.gov/airquality/greenbook/anayo_mi.html. On October 1, 2015, EPA established a new NAAQS for ozone. While designations of attainment and non-attainment for the new standard have not yet occurred, Genesee County is meeting the new standard based on quality assured and certified ozone monitoring data for the 2013-2015-time period. In addition, preliminary quality assured data for 2016 continue to show attainment of the ozone NAAQS.

¹³⁰ Genesee County is currently in attainment for all NAAQS. See http://www.epa.gov/airquality/greenbook/anayo_mi.html.

¹³¹ *Risk Assessment of Selected Municipal Waste Combustors and Wood Waste Boilers in the State of Michigan*, U.S. EPA Region 5 (January, 2001) [2001 *Statewide Risk Assessment*]

¹³² *Genesee Power Station Point Source Impact Assessment*, Office of Research and Development, National Center for Exposure Assessment, (May, 2005) [2005 *County-wide Air Toxics Study*].

within a 3 mile radius¹³³ of the facility; (2) impacts of GPS emissions within Genesee County; (3) impacts of emissions from multiple point sources, including GPS, within a 3 mile radius of GPS; and (4) impacts of emissions from multiple point sources, including GPS, within Genesee County.

The time horizon for the risk estimates assumed a 30-year exposure period. The analyses to determine the human health impacts of estimated exposure used the best available facility data and the best available risk assessment tools. EPA sought to represent assessments that could have been conducted by MDEQ at the time the permit was issued.¹³⁴

Since those analyses were conducted, EPA has identified several types of additional emissions data including stack test information and inventory data. EPA updated the *Statewide Risk Assessment* and the *County-wide Air Toxics Assessment* to include additional information about key assumptions available at the time of the permit issuance and about more current conditions.¹³⁵ The *Update* describes the current operating status of the nine facilities evaluated in the *2001 Statewide Risk Assessment*.

i. Direct Exposure

In the analyses conducted, EPA found no risk above 10^{-6} or HI of 1.0 statewide, within Genesee County, or from GPS alone from emissions of air toxics.

ii. Indirect Exposure

1. Facilities Similar to GPS in Michigan

The *2001 Statewide Risk Assessment* examined potential cancer risk and non-cancer hazards from air toxics emissions from GPS and similar facilities statewide for the following exposure pathways: (1) Direct Exposure: Inhalation, (2) Indirect Exposure: Residential Ingestion Scenario (*i.e.*, garden produce and soil ingestion), and (3) Indirect Exposure: Locally-Caught Fish Consumption Scenario (*i.e.*, combined exposure pathways of inhalation, soil ingestion, water ingestion, home garden produce ingestion, and fish ingestion).

Where a cancer risk was found above 10^{-6} or a hazard index of 1.0 in the *2001 Statewide Risk Assessment*, EPA completed an update in 2014 to include additional information about key assumptions available at the time of the permit issuance and about current conditions (*e.g.*, *facility closures, regulatory changes, reviewing emissions data concerns*).

¹³³ The 3-mile radius study area reflects an area of alleged impacts identified in the Title VI complaint. *2005 County-wide Air Toxics Study*, p. 6.

¹³⁴ An exception in terms of risk assessment tool availability is the Human Health Risk Assessment Protocol (HHRAP) used in the 2001 statewide assessment. The draft HHRAP was issued in 1998, and the final in 2005. HHRAP drew from earlier guidance: 1994 *Hazardous Waste Minimization and Combustion Strategy*; 1994 *Guidance for Performing Screening Level Risk Analysis at Combustion Facilities Burning Hazardous Wastes*; and 1990 *Methodology for Assessing Health Risks Associated with Indirect Exposure to Combustor Emissions, Interim Final*.

¹³⁵ Draft *Genesee Power Station Technical Assessment Update*, U.S. EPA Region 5 (October 2014) [*Update*].

The *Update* looked at the three facilities in the 2001 *Statewide Risk Assessment* that were estimated to have a current cancer risk in the 10^{-4} to 10^{-6} range, including GPS. However, there is no current stack test data for those three facilities that can be used to update their emissions rates in the *Statewide Assessment*. Where updated stack tests were available for other facilities they showed emissions rates significantly (93% - 99%) lower than those used in the 2001 *Statewide Assessment*. Given the magnitude of the remaining risk values relative to 1×10^{-6} and the conservative nature of the analysis, EPA does not believe that further analysis of these facilities is warranted.

2. Facilities Similar to GPS in Michigan

Where a cancer risk was found above 10^{-6} or a hazard index of 1.0 in the 2005 *County-wide Air Toxics Study*, EPA completed an update in 2014 to include additional information about key assumptions available at the time of the permit issuance and about current conditions. The *Update* discusses the operating status of sources of air toxics in Genesee County based on emissions of pollutants that led to the highest risk in the 2005 *County-wide Air Toxics Assessment*. In addition, it discusses information on controls, permit limits, and emissions test results for selected facilities, including how emissions of pollutants of interest in the 2005 assessment may have changed since the time of the permitting decision for GPS. The goal of the *Update* was to help EPA assess whether such changes affect the conclusions of the earlier analyses.

The *Update* found that the GPS emissions do not contribute to the risk of adverse health effects from the one air point source in county that had a cancer risk in the 10^{-4} to 10^{-6} range (*i.e.*, maximum risk of 2×10^{-6}). The risk is only very marginally above 10^{-6} and given the conservative assumptions of the assessment, the actual risk is likely below 10^{-6} .

3. Conclusion

None of the four analyses conducted by EPA provided sufficient evidence to establish adversity/harm with respect to health effects. Therefore, there is insufficient evidence to establish a *prima facie* case of adverse disparate impact.

However, Complainants have recently indicated that they are concerned about potential impacts from the GPS facility as it is currently being operated, including potential impacts regarding odor, fugitive dust, and lead; and are concerned about MDEQ's responsiveness to such complaints. Therefore, EPA makes recommendations to address this issue below.

Issue 3: MDEQ's Non-Discrimination Program

EPA reviewed MDEQ's compliance with its longstanding obligation to establish procedural safeguards required by EPA's regulations implementing the federal non-discrimination statutes, and to ensure meaningful access for persons with disabilities and limited-English proficiency to MDEQ programs and activities.

1. Legal Authority

EPA's nondiscrimination regulations at 40 C.F.R. Part 7, Subpart D contain the elements identified as being necessary parts of a recipient's nondiscrimination program: a grievance procedure under 40 C.F.R. §7.90;¹³⁶ a statement of nondiscrimination under 40 C.F.R. §7.95;¹³⁷ and under 40 C.F.R. §7.85(g);¹³⁸ and recipients with more than fifteen (15) full-time employees must designate a person to coordinate its efforts to comply with its non-discrimination obligations.

On June 25, 2004, EPA issued *Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons* (LEP Guidance).¹³⁹ The LEP guidance clarifies recipient's existing legal obligations to provide meaningful access by limited English proficient persons in all programs and activities that receive federal financial assistance from EPA. The LEP guidance also provides a description of the factors recipients should consider in fulfilling their responsibilities to limited English proficient persons to ensure meaningful access to recipients' programs and activities and the criteria EPA uses to evaluate whether recipients are in compliance with Title VI and Title VI implementing regulations.

On March 21, 2006, EPA published its *Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* which was developed for recipients of EPA assistance implementing environmental permitting programs. It discusses various approaches, and suggests tools that recipients may use to enhance the public involvement aspects of their current permitting programs. It also addresses potential issues related to Title VI and EPA's regulations implementing Title VI.¹⁴⁰

2. Analysis

In July 2014, EPA informed MDEQ that it was in not in compliance with EPA's regulation found at 40 C.F.R. Part 7, Subpart D which list the requirements for a recipient's nondiscrimination program. During a phone call on August 20, 2015, to discuss informal resolution of the Complaint, EPA informed MDEQ again that it was not in compliance with EPA's nondiscrimination regulation. EPA also clarified to MDEQ that in order to come into compliance and remedy the almost 30 years of noncompliance, MDEQ would need to implement procedural safeguards that EPA identified for MDEQ in July 2015.

On November 6, 2015, MDEQ provided EPA a copy of MDEQ's October 28, 2015 "Policy and Procedure Number: 09-024, Subject: Nondiscrimination in Programs Receiving Federal Assistance from the U.S. Environmental Protection Agency" (Nondiscrimination Policy) and links to a number of other documents related to MDEQ's public participation process. EPA reviewed those materials and on December 3, 2015, informed MDEQ that while MDEQ had belatedly taken a step forward, MDEQ's Nondiscrimination Policy was insufficient to resolve

¹³⁶ 40 C.F.R. § 7.90.

¹³⁷ 40 C.F.R. § 7.95.

¹³⁸ 40 C.F.R. § 7.85.

¹³⁹ <https://www.federalregister.gov/documents/2004/06/25/04-14464/guidance-to-environmental-protection-agency-financial-assistance-recipients-regarding-title-vi>

¹⁴⁰ https://www.epa.gov/sites/production/files/2013-09/documents/title6_public_involvement_guidance.3.13.13.pdf

the issues found during the investigation, including its failure to have such a policy in place for nearly 30 years, and to prevent the same issues from happening again.

MDEQ's Nondiscrimination Policy does not mention or implement many of the foundational elements for a standard nondiscrimination program that EPA identified. Furthermore, EPA has not been able to find this information on MDEQ's website; nor has MDEQ provided EPA with any supplemental information to support its compliance with federal nondiscrimination law and EPA's nondiscrimination regulation. For example, EPA has been unable to determine how MDEQ ensures that all persons have equal access to MDEQ's public participation process, including persons with disabilities or who have limited- English proficiency. Given the paucity of documented information available, EPA is concerned that MDEQ does not have a non-discrimination program – on paper or in practice.

As recently as January 12, 2017, EPA reviewed MDEQ's website to determine whether there was any evidence that MDEQ had corrected any of the deficiencies identified in its non-discrimination program. The results of EPA's review follow:

a. Notice of Non-Discrimination

According to EPA's regulation at 40 C.F.R. § 7.95,

A recipient shall provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, age, or handicap in a program or activity receiving EPA assistance or, in programs or activities covered by section 13, on the basis of sex. Methods of notice must accommodate those with impaired vision or hearing. At a minimum, this notice must be posted in a prominent place in the recipient's offices or facilities. Methods of notice may also include publishing in newspapers and magazines, and placing notices in recipient's internal publications or on recipient's printed letterhead. Where appropriate, such notice must be in a language or languages other than English." The notice must identify the employee responsible for coordinating the recipient's compliance with the Federal nondiscrimination statute and EPA's implementing regulations.

MDEQ's notice is deficient in a number of respects. The notice does not list the Federal nondiscrimination statutes to inform people about the statutes that protect them and on what bases complaints may be filed through MDEQ's grievance procedure. Instead, MDEQ refers people to other sources. Clear and complete notice to the public and employees of conduct prohibited by the Federal nondiscrimination laws is required.

MDEQ's notice is not prominently displayed on MDEQ's home page.¹⁴¹ Searching MDEQ's website using common sense search terms such as "race," "Title VI," "discrimination," and "disability," does not lead directly to the notice. According to EPA's review, MDEQ's notice

¹⁴¹ MDEQ's Nondiscrimination Policy and Procedure states that the notice will "be posted in a prominent place in the DEQ's offices or facilities" and that it may publish the notice newspapers and magazines and placing notices in DEQ's publications.

currently only appears within the Nondiscrimination Policy and Procedure in a location on MDEQ's website that people have difficulty accessing.

Additionally, methods of notice must provide meaningful access to persons who are LEP and accommodate persons with disabilities. MDEQ's notice, however, is English only with a note that those who are LEP can request such notice in a language or languages other than English. Although MDEQ's current notice states that it shall accommodate those with impaired vision or hearing, there is no evidence on MDEQ's website that these services are indeed available or how to access them.

Also, the notice states that the Nondiscrimination Compliance Coordinator is the employee responsible for coordinating MDEQ's compliance with the Federal nondiscrimination statutes and EPA's implementing regulations, but does not specifically identify this person by name.

b. Grievance Procedures

Section C of MDEQ's Nondiscrimination Policy contains grievance procedures "in order to assure the prompt and fair resolution of complaints that allege a violation by the DEQ of 40 CFR, Part 7." The grievance procedure provides timeframes for MDEQ will take certain actions and provides for an appeal process.

However, the grievance procedure does not list the types of discrimination prohibited or the applicable Federal nondiscrimination statutes. Instead, MDEQ directs people to EPA's Part 7 regulation to determine the type of discrimination (*e.g.*, race, national origin) that has occurred and is one that is redressed by MDEQ's grievance process.

Providing adequate notice of these procedures and how to file complaints is critical to the proper functioning of MDEQ's Nondiscrimination program. MDEQ has given no indication, either in its written response or during informal resolution discussions with EPA that it intends to do more to inform the public of the existence of the grievance procedure beyond posting in its buildings and in its current, difficult-to-find location on its website.

c. Retaliation

MDEQ's Nondiscrimination Policy fails to contain assurances that retaliation is prohibited and that claims of retaliation will be handled promptly. To ensure individuals can invoke these grievance procedures without fear of reprisal, MDEQ's Nondiscrimination Policy and grievance procedures should explicitly prohibit retaliation against any individual "for the purpose of interfering with any right or privilege guaranteed under the Acts or this part" or because that individual "has filed a complaint or has testified, assisted, or participated in any way in an investigation, proceeding or hearing" under this part or has opposed any practice made unlawful by this part."¹⁴² Prohibited retaliatory acts include intimidation, threats, coercion, or discrimination against any such individual or group.

¹⁴² 40 CFR §100.

MDEQ therefore should take steps to prevent any retaliation against those who file a complaint or who provide information regarding the complaint. At a minimum, MDEQ should ensure that complainants know how to report any potential retaliation.

d. Other Procedural Safeguards

MDEQ's Nondiscrimination Policy is also deficient in that it does not address the need to:

- (1) periodically assess the efficacy of MDEQ's efforts to maintain compliance with federal non-discrimination statutes;
- (2) conduct reviews of formal and informal discrimination complaints filed with the MDEQ in order to identify and address any patterns or systemic problems; or
- (3) ensure appropriate training for persons involved in informal resolution of discrimination complaints filed with MDEQ under federal non-discrimination statutes.

In addition, MDEQ's Nondiscrimination Policy and its grievance procedures fail to, among other things, discuss available informal resolution process(es) and the options for complainants to engage in those processes.

Moreover, it is unclear whether the other responsibilities of the Chief of the Office of Environmental Assistance would create a conflict of interest with those of the Nondiscrimination Compliance Coordinator, as they are currently envisioned to be the same person.

e. Training

MDEQ has given no indication, either in its written response or during informal resolution discussions with EPA, whether any training will be provided to the Nondiscrimination Compliance Coordinator or other MDEQ employees to help them understand MDEQ's obligations under the Federal nondiscrimination statutes. In order to implement a properly functioning grievance procedure, the Nondiscrimination Compliance Coordinator must have adequate training on what constitutes discrimination and retaliation prohibited under the Federal nondiscrimination statutes and EPA's implementing regulations; how the grievance procedures operate; how to gather relevant evidence and assess it in the Title VI context; the importance of a fair and impartial process; and the applicable legal standards.

f. Public Participation

The MDEQ website shows no evidence of a public participation plan, including processes and procedures for assessing communities (including demographics, community concerns, history, and background), performing public outreach, determining locations where public meetings should take place, providing language assistance services, providing access services for disabled persons, and providing notification of the location of the information repository.

g. Limited-English Proficiency

While reviewing the current public participation policies, guidance, and procedures for environmental programs provided by MDEQ, EPA could not find any information about how MDEQ will ensure that LEP persons will have meaningful access to MDEQ's public participation process.

Although EPA has brought this issue to MDEQ's attention and has been providing technical assistance to MDEQ for some time about ensuring access for LEP persons MDEQ has not submitted any documentation suggesting that it has performed any analysis to assess the needs of the LEP population it serves on a statewide basis consistent with EPA's 2004 Guidance. MDEQ has not provided any information suggesting that it has conducted any assessment of the number of eligible LEP persons in its communities; the frequency with which LEP persons come in contact with MDEQ programs; the importance of MDEQ programs and activities to LEP persons; and the resources available to MDEQ and the associated costs. There is no indication of a language access plan, or a clearly defined program to make communities aware that foreign language services are available, to translate standardized documents, or to provide for simultaneous oral interpretation of live proceedings such as town hall meetings. Moreover, EPA determined that MDEQ does not have any information on its website about its public participation process in languages other than English. After much searching, EPA found isolated links to two documents related to a particular facility that were translated into Spanish and Arabic. Also, there is no evidence that MDEQ adequately notifies LEP individuals of their right to an interpreter or the translation of all vital documents.

h. Disability

There appears to be no well-defined process for ensuring that MDEQ's facilities and non-Agency facilities are physically accessible for persons with disabilities; or to provide, at no cost, auxiliary aids and services such as qualified interpreters for those who are deaf or hard of hearing. Notifications for access for persons with disabilities are not routinely inserted on public notice documents. The only disability notice that can be readily found by the public is an ADA link at the bottom of the MDEQ website. This links to a State of Michigan site for employment and hiring.

3. Conclusion

On December 3, 2015, EPA informed MDEQ that while MDEQ's Nondiscrimination Policy and Procedure policy is a step forward, it alone is not sufficient to assure EPA that MDEQ will be able to meet its nondiscrimination obligations. Nor did the public participation guidance and procedures MDEQ provided address concerns found during the investigation.

Given the aforementioned 30 years of history, EPA is deeply concerned that MDEQ will not fulfill its responsibility to implement a fully functioning and meaningful non-discrimination program as required under EPA regulations.

Recipient' Response

In addition to responses to specific allegations discussed above, MDEQ also proffered a series of general arguments supporting its position that the Genesee Complaint should be dismissed. MDEQ asserted that EPA's consideration of the Title VI complaint should be procedurally barred under the doctrines of *res judicata* and collateral estoppel by the EAB ruling, the United States District Court's dismissal of Plaintiffs' Title VI claims with prejudice, and the rulings by the Genesee County Circuit Court and the Michigan Court of Appeals.¹⁴³ MDEQ further stated that the complaint was moot.¹⁴⁴ In 1999, MDEQ stated that the administrative complaint was six years old, concerned a 1992 permit, and raised issues that have not been raised since. MDEQ stated "[t]here is no actual ongoing controversy."¹⁴⁵

Res judicata is available as an affirmative defense once a law suit has been filed in court¹⁴⁶ and was prematurely raised here. Furthermore, federal courts, including the Sixth Circuit, have recognized that the government has an interest in enforcing federal law that is separate from private interests and renders *res judicata* inapplicable in this context.¹⁴⁷ Even if *res judicata* did apply, EPA was not a party to, nor was it in privity with any of the parties to the prior proceedings and so would not be bound by those prior rulings.¹⁴⁸

Attempts to Achieve Informal Resolution

On July 16, 2014, EPA pointed out the non-discrimination regulatory requirements to MDEQ. Prior to completing the investigation, consistent with EPA regulations and the EPA's Case Resolution Manual (<https://www.epa.gov/ocr/case-resolution-manual>), EPA attempted to informally resolve the Genesee Complaint. In July 2015, as part of informal resolution discussions, EPA provided MDEQ more specific recommendations to resolve issues related to the permitting of GPS and MDEQ's failure to comply with EPA's regulatory requirements and to establish the foundational elements of a properly functioning nondiscrimination program. After admitting in August 2015 to its failure to have a non-discrimination program in place and to comply with EPA's regulatory requirements, MDEQ adopted its Nondiscrimination Policy and Procedure in October 2015.¹⁴⁹

¹⁴³ Letter from Paul F. Novak, Assistant Attorney General, Natural Resources Division to Mike Mattheisen & Carlton Waterhouse, EPA, US EPA 1-2 (Dec. 23, 1997).

¹⁴⁴ Letter from Todd B. Adams, Assistant Attorney General, Natural Resources Division, Michigan Department of Attorney General to Ann Goode, Director, EPA, US EPA 3 (July 28, 1999).

¹⁴⁵ *Id.*

¹⁴⁶ Fed. R. Civ. P. 8(c).

¹⁴⁷ See, *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1976), following, *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975), cert. denied, 423 U.S. 994 (1975) (examining *res judicata* in the context of EEOC cases). See also, *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (rejecting *res judicata* claim in an ERISA suit); *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (*en banc*) (considering Voting Rights Act and Title VII actions and comparing with ERISA suit in concluding that statutes that implicate underlying constitutional concerns protect the public interest, which is broader than the interest of private parties who bring suit).

¹⁴⁸ See, e.g., *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971) (stating that, "Due process prohibits estopping [litigants who never appeared in a prior action and did not have a chance to present their evidence and argument on the claim] despite one or more existing adjudications of the identical issue which stand squarely against their position.").

¹⁴⁹ October 28, 2015, "Policy and Procedure Number: 09-024, Subject: Nondiscrimination in Programs Receiving Federal Assistance from the U.S. Environmental Protection Agency" (Nondiscrimination Policy and Procedure).

On March 21, 2016, the Governor's Flint Water Advisory Task Force recognized the Flint drinking water crisis as a "case of environmental injustice." The Task Force stated "Flint residents, who are majority Black or African American and among the most impoverished of any metropolitan area in the United States, did not enjoy the same degree of protection from environmental and health hazards as that provided to other communities. Moreover, by virtue of their being subject to emergency management, Flint residents were not provided equal access to, and meaningful involvement in, the government decision-making process."¹⁵⁰

By March 2016, six months had passed since EPA had identified a set of common sense measures focused on ensuring that residents of Flint, and all of Michigan, had equal access to, and meaningful involvement in, the government decision-making process. It is now 18 months since MDEQ was provided those procedural safeguards. MDEQ has both argued that these procedural safeguard issues should be dealt with through a process separate from that of the Genesee Complaint and that it needed more time to consider EPA's recommendations. EPA has determined that continuing our attempts to informally resolve issues raised in the Genesee Complaint investigation are likely to continue to be unproductive.

Continuing Concerns

Based on the investigation of the circumstances surrounding the issuance of the Genesee permit and reviewing public participation materials provided by MDEQ, EPA has significant concerns about MDEQ's current public participation program and whether MDEQ can ensure that discriminatory treatment would not occur today. Similarly, EPA for the reasons discussed above is deeply concerned that MDEQ does not take seriously its responsibility to implement a properly functioning non-discrimination program as required under EPA regulations.

In the context of the Flint Complaint, EPA has already informed MDEQ that it will conduct an investigation into MDEQ's procedures for public notification and involvement as well as compliance with its non-discrimination requirements. In that investigation, EPA will investigate further whether MDEQ's public participation program has sufficient safeguards to ensure it is operated in a nondiscriminatory manner; and whether MDEQ's non-discrimination program is easily accessible and designed and staffed to function properly.

In recent conversations, the Complainants raised the public's current inability to track the status and resolution of both environmental and civil rights complaints filed with MDEQ and inability to access accurate information about facility emissions. Access to such information is a critical component of meaningful public participation in government processes. Therefore, EPA will review these concerns in its investigation of the Flint Complaint.

In correspondence submitted after operation of GPS began and in recent conversations, the Complainants also raised related to the operation of GPS including the impacts of odors, fugitive dust, and lead emissions.

Next Steps

¹⁵⁰ Flint Water Advisory Task Force, *Flint Water Advisory Task Force Final Report* (March 2016), page 54.

In order ensure the problems found in MDEQ's public participation process will not occur in the future, EPA recommends MDEQ:

1. Develop and implement a policy that will require MDEQ to create and/or carry out each step listed below each time that MDEQ engages in a public participation or public involvement process:
 - a. An overview of MDEQ's plan of action for addressing the community's needs and concerns;
 - b. A description of the community (including demographics, history, and background);
 - c. A contact list of agency officials with phone numbers and email addresses to allow the public to communicate via phone or internet;
 - d. A detailed plan of action (outreach activities) Recipient will take to address concerns;
 - e. A contingency plan for unexpected events;
 - f. Location(s) where public meetings will be held (consider the availability and schedules of public transportation);
 - g. Contact names for obtaining language assistance services for limited-English proficient persons, including, translation of documents and/or interpreters for meetings;
 - h. Appropriate local media contacts (based on the culture and linguistic needs of the community); and
 - i. Location of the information repository.
2. Develop factors to assist MDEQ employees in making decisions regarding the appropriate time, location, duration, and security at public meetings and guidance to ensure they are applied in a non-discriminatory manner.
3. Establish and maintain an environmental complaint receiving and response system that clearly enables those complainants to submit environmental complaints, determine how the complaints are responded to by MDEQ, and review documents associated with the results of any MDEQ investigations regarding their complaints.

In order to ensure that MDEQ's non-discrimination program is easily accessible and designed and staffed to function properly, EPA recommends MDEQ:

4. Adopt a notice of nondiscrimination that contains at a minimum, the following statements:
 - a. MDEQ does not discriminate on the basis of race, color, national origin, disability, age, or sex in the administration of its programs or activities, as required by applicable laws and regulations.

- b. MDEQ is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Part 7 (Non-discrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency), including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972.
 - c. If you have any questions about this notice or any of MDEQ's non-discrimination programs, policies or procedures, you may contact:
DEQ Nondiscrimination Compliance Coordinator
Office of Environmental Assistance
Michigan Department of Environmental Quality
525 West Allegan Street
P.O. Box 30457
Lansing, MI 48909-7957
Email: [XXXXXXXXXX]@michigan.gov
Phone Number: [XXX-XXX-XXXX]
 - d. If you believe that you have been discriminated against with respect to a MDEQ program or activity, you may contact the DEQ Nondiscrimination Compliance Coordinator identified above or visit our website at <http://www.michigan.gov/deq/> and click the link for Nondiscrimination Policy and Procedure to obtain a copy of the DEQ's procedures to file a complaint of discrimination.
5. Prominently post the notice of non-discrimination on the MDEQ website, in general publications that are distributed to the public, and in MDEQ's offices or facilities. In order to ensure effective communication with the public, MDEQ will have its notice of non-discrimination made accessible to limited-English proficient individuals and individuals with disabilities.
 6. Adopt grievance procedures that will at a minimum address the following:
 - a. Who may file a complaint under the procedures;
 - b. Which informal process(es) are available, and the options for complainants to bypass an informal process for a formal process at any point;
 - c. That an appropriate, prompt and impartial investigation of any allegations filed under federal non-discrimination statutes will be conducted;
 - d. That the preponderance of the evidence standards will be applied during the analysis of the complaint;
 - e. Contain assurances that retaliation is prohibited and that claims of retaliation will be handled promptly if they occur;
 - f. That complaints will be investigated in a prompt and appropriate manner;
 - g. That written notice will be promptly provided about the outcome of the investigation, including whether discrimination is found, and a description of the investigation process. (Whether complaint investigations and resolutions to be

“prompt” will vary depending on the complexity of the investigation and the severity and extent of the alleged discrimination. For example, the investigation and resolution of a complaint involving multiple allegations and multiple complainants likely would take longer than one involving a single allegation of discrimination and a single complainant.)

7. Widely publish in print and on-line its grievance procedures to process discrimination complaints filed under federal non-discrimination statutes, and do so on a continual basis, to allow for prompt and appropriate handling of those discrimination complaints.
8. Ensure that it has designated at least one Non-Discrimination Coordinator to ensure MDEQ’s compliance with Title VI, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Section 13 of Federal Water Pollution Control Act of 1972, and Title IX of the Education Amendments of 1972 (hereinafter referred to collectively as the federal non-discrimination statutes).
9. Ensure that it has widely published in print and on-line, and will do so on a continual basis, the title of the Non-Discrimination Coordinator, email address, telephone contact information, and duties of the Non-Discrimination Coordinator.
10. Ensure that the Non-Discrimination Coordinator’s responsibilities include the following:
 - a. Provide information to individuals regarding their right to services, aids, benefits, and participation in any MDEQ program or activity without regard to their race, national origin, color, sex, disability, age or prior opposition to discrimination, as well as notice of MDEQ’s formal and informal grievance processes and the ability to file a discrimination complaint with MDEQ.
 - b. Establish grievance policies and procedures or mechanisms (*e.g.*, an investigation manual) to ensure that all discrimination complaints filed with MDEQ under federal non-discrimination statutes are processed promptly and appropriately. One element of any policy and procedure or mechanism must include MDEQ providing meaningful access for limited-English proficient individuals and individuals with disabilities to MDEQ programs and activities.
 - c. Ensure the tracking of all discrimination complaints filed with MDEQ under federal non-discrimination statutes including any patterns or systemic problems.
 - d. Conduct a semiannual review of all formal and informal discrimination complaints filed with the MDEQ Non-Discrimination Coordinator under federal non-discrimination statutes and/or any other complaints independently investigated by MDEQ in order to identify and address any patterns or systemic problems.
 - e. Inform and advise MDEQ staff regarding the MDEQ’s obligations to comply with federal non-discrimination statutes and serve as a resource on such issues.
 - f. Ensure that complainants are updated on the progress of their discrimination complaints filed with MDEQ under federal non-discrimination statutes and are promptly informed as to any determinations made.

- g. Annually assess the efficacy of MDEQ's efforts to maintain compliance with federal non-discrimination statutes.
 - h. Ensure appropriate training in Alternative Dispute Resolution for persons involved in informal resolution of discrimination complaints filed under federal non-discrimination statutes.
 - i. Provide or procure appropriate services to ensure MDEQ employees are appropriately trained on MDEQ non-discrimination policies and procedures, as well as the nature of the federal non-discrimination obligations.
11. Ensure that the Non-Discrimination Coordinator will not have other responsibilities that create a conflict of interest (*e.g.*, serving as the Non-Discrimination Coordinator as well MDEQ legal advisor or representative on civil rights issues).
 12. Ensure its public involvement process is available to all persons regardless of race, color, national origin (including limited-English proficiency), age, disability, and sex.
 13. Conduct the appropriate analysis described in EPA's LEP Guidance found at 69 FR 35602 (June 25, 2004) and <http://www.lep.gov> to determine what language services it may need to provide to ensure that limited-English proficient individuals can meaningfully participate in the process. MDEQ should develop a language access plan consistent with the details found in EPA's training module for LEP. <http://www.epa.gov/civilrights/lepaccess.htm>
 14. Develop, publish, and implement written procedures to ensure meaningful access to all MDEQ programs and activities by all persons, including access by limited-English proficient individuals and individuals with disabilities.
 15. Provide at no cost appropriate auxiliary aids and services including, for example, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals as necessary to ensure effective communication or an equal opportunity to participate fully in the benefits, activities, programs and services provided by MDEQ in a timely manner and in such a way as to protect the privacy and independence of the individual.
 16. Ensure that all appropriate MDEQ staff have been trained on its internal non-discrimination policies and procedures and on federal non-discrimination obligations.
 17. Have a plan in place to ensure that such training is a routine part of the on-boarding process for new employees.

In addition, in order to address continuing community concerns related to the operation of the GPS facility, EPA urges MDEQ to:

1. Continue any current investigations and investigate any community concerns (including those concerns brought to MDEQ's attention by EPA) or complaints hereafter expressed regarding odor, fugitive dust, lead, or other impacts from the GPS facility.

2. Consider its Title VI obligations, the findings of the investigations conducted pursuant the recommendation immediately above, and the concerns expressed by the communities near the GPS facility during any future permit renewal or permit modifications for the facility and document such consideration.
3. Ensure that it has in place an environmental complaint receiving and response system that clearly enables those complainants wishing to raise environmental concerns regarding the GPS Facility to submit environmental complaints, determine how the complaints are responded to by MDEQ, and review documents associated with the results of any MDEQ investigations regarding their complaints.

This letter sets forth OCR's disposition of the Genesee Complaint (EPA File No. 01R-94-R5). This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. This letter and any findings herein do not affect MDEQ's continuing responsibility to comply with Title VI or other federal non-discrimination laws and EPA's regulations at 40 CFR Part 7, including § 7.85, nor do they affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not addressed in this letter. If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,



Lilian S. Dorka
Director
External Civil Rights Compliance Office
Office of General Counsel

Cc:

Elise B. Packard
Associate General Counsel for Civil Rights and Finance
U.S. EPA Office of General Counsel

Cheryl Newton
Acting Deputy Civil Rights Official, U.S. EPA Region 5



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 15 2015

OFFICE OF
CIVIL RIGHTS

Return Receipt Requested

Certified Mail #: 7009 2820 0002 1759 1803

In Reply Refer to:

EPA File No. 08R-13-R6

(b) (6)

Baton Rouge, Louisiana 70807

Re: Rejection and Referral of Administrative Complaint

Dear (b) (6)

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR), is rejecting your complaint received by the EPA on December 5, 2012, and supplemented on March 1, 2013, April 8, 2013, and April 9, 2013. OCR's rejection of the complaint is based on your September 4, 2013, response you provided to a request from OCR for clarification.

The complaint alleges that the City of Baton Rouge (the City) has violated Title VI of the Civil Rights Act of 1964, as amended (Title VI), 42 United States Code (U.S.C.) §§ 2000d *et seq.*, and EPA's nondiscrimination regulations found at 40 Code of Federal Regulations (C.F.R.) Part 7. In it, you state that your community "is being forced to relocate because of negative impacts from the North Baton Rouge Treatment Plant," and you also state that, "The University Place Subdivision continues to live in human waste on a daily basis." Your first allegation is rejected and is being referred to the U.S. Department of Housing and Urban Development (HUD) as EPA lack of jurisdiction over its subject matter. OCR has conducted an inquiry into your second allegation and is rejecting it based on its lack of merit which is described in more detail below.

Pursuant to the EPA's nondiscrimination regulations, OCR conducts a preliminary review of discrimination complaints to determine whether to accept, reject, or refer a complaint. *See* 40 C.F.R. § 7.120(d) (1). For a complaint to be accepted for investigation, it must meet the jurisdictional requirements described in the EPA's Part 7 regulations (nondiscrimination regulations). First, the complaint must be in writing. Second, the complaint must describe an alleged discriminatory act that, if true, would violate the EPA's nondiscrimination regulations (*i.e.*, an alleged discriminatory act based on race, color, national origin, sex, or disability). Third, the complaint must be filed within 180 days of the alleged discriminatory act. Finally, the complaint must be filed against an applicant for, or recipient of, EPA assistance that allegedly committed the

discriminatory act. For your reference, a copy of the EPA's nondiscrimination regulations is enclosed.

Allegation 1

Your community is being forced to relocate due to negative impacts from the North Baton Rouge Sewage Treatment Plant.

OCR has concluded that the concerns you have raised regarding the residence buyouts may fall under HUD's subject matter expertise. Thus, EPA is referring this claim to HUD for review and potential action. A copy of OCR's referral letter to HUD is enclosed with this correspondence. The contact person at HUD is:

Mr. Garry Sweeney, Fair Housing and Equal Opportunity, Region VI
U.S. Department of Housing and Urban Development
801 Cherry Street
Unit 45, Suite 2500
Fort Worth, Texas 78102-6803

Telephone: 817-978-5900
1-888-560-8913
Facsimile: 817-978-5876
TTY/TDD: 817-978-5595
Email: Complaints.Office.06@hud.gov

Allegation 2

The University Place Subdivision continues to live in human waste on a daily basis.

In your clarification letter, you stated that residents adjacent to the North Wastewater Treatment Plant (NWWTP) are suffering due to sewage line construction near the NWWTP, which you claim is being completed in order to expand the NWWTP, so that the sewage line may receive waste from Zachary, Louisiana. You further state that this expansion construction will create negative conditions and health problems. OCR has consulted staff in EPA Region 6 and learned that the construction is related to transmission lines that will provide the infrastructure necessary for the erection of a buffer space between the University Place subdivision and the NWWTP. The construction that you allege as a discriminatory act appears necessary to remedy your complaint.

The City of Baton Rouge (The City) issued a press release October 27, 2011, inviting residents to review the buffer acquisition plans on November 3, 2011.¹ The press release mentioned the project to provide a buffer zone around the NWWTP and that numerous properties would be acquired. The construction occurring will help control odors and enhance the beautification of the area surrounding the plant. The City issued

¹ City of Baton Rouge Press Release, October 27, 2011, from Mayor "Kip" Holden office.

press releases, held meetings, and issued door handles to inform all residents of what was going to occur and the process for the buyouts. Again this construction appears necessary, and you and the residents were fully informed of what was going to occur. The NWWTP also conducted an odor study which was used as a basis for justifying the buffer lines, and the history of odor control improvements made and planned at the NWWTP.²

OCR is closing your complaint. If you have questions regarding this letter or the complaint's disposition, please contact Ericka Farrell of the OCR External Compliance Program at (202) 564-0717, via electronic mail at farrell.ericka@epa.gov, or by mail at U.S. EPA, Office of Civil Rights (Mail Code 1201A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460-1000.

Sincerely,



Velveta Golightly-Howell
Director
Office of Civil Rights

Enclosure

cc: Elise Packard
Associate General Counsel
Civil Rights & Finance Law Office
(MC 2399A)

Samuel Coleman
Deputy Regional Administrator
Region VI, (MC-6RA)

² Department of Public Works, City of Baton Rouge, Memo, September 9, 2011.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 21 2015

OFFICE OF
CIVIL RIGHTS

Return Receipt Requested

Certified Mail #: 7009 0640 0006 0305

In Reply Refer to:

EPA File No. 08R-13-R6

Mr. Pete Newkirk, Director
City of Baton Rouge
Department of Public Works
Post Office Box 1471
Baton Rouge, Louisiana 70821

Re: Rejection and Referral of Administrative Complaint

Dear Director Newkirk:

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) received complaints on December 5, 2012, March 1, 2013, and April 8 and 9, 2013, alleging that the City of Baton Rouge has violated Title VI of the Civil Rights Act of 1964, as amended (Title VI), 42 United States Code (U.S.C.) §§ 2000d *et seq.*, and EPA's nondiscrimination regulations found at 40 Code of Federal Regulations (C.F.R.) Part 7. Pursuant to EPA's nondiscrimination regulations, OCR conducts a preliminary review of administrative complaints to determine whether to accept, reject, or refer a complaint. *See* 40 C.F.R. § 7.120(d)(1).

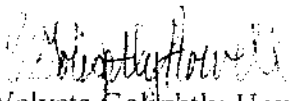
To be accepted for investigation, a complaint must meet the jurisdictional requirements described in EPA's nondiscrimination regulations. First, it must be in writing. *See* 40 C.F.R. § 7.120(b)(1). Second, it must describe an alleged discriminatory act that, if true, may violate EPA's nondiscrimination regulations (*i.e.*, an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *Id.* Third, it must be filed within 180 calendar days of the alleged discriminatory act. *See* 40 C.F.R. § 7.120(b)(2). Finally, it must be filed against an applicant for, or a recipient of, EPA financial assistance that allegedly committed the discriminatory act. *See* 40 C.F.R. § 7.15.

After careful review, OCR is rejecting the first allegation presented in the complaint for investigation because it does not describe a permitting or other action by the City, which may be considered a timely discriminatory act. In addition, the second claim appears to fall under the subject matter expertise of the U.S. Department of Housing and Urban Development (HUD). Therefore, OCR is referring this claim to HUD for its review and potential action, if appropriate. The contact person at HUD for

the referral of this allegation is: Mr. Garry Sweeney, FHEO Region VI, U.S. Department of Housing and Urban Development, 801 Cherry Street, Unit 45, Suite 2500, Fort Worth, Texas 78102 at (817) 978-5900.

If you have any questions about OCR's disposition of the subject complaint or this letter, please contact Ericka Farrell of my staff at (202) 564-0717, via e-mail at farrell.ericka@epa.gov, or via mail at U.S. EPA, Office of Civil Rights (Mail Code 1201A), 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

Sincerely,


Velveta Golightly-Howell
Director
Office of Civil Rights

cc: Elise Packard
Associate General Counsel
Civil Rights and Finance Law Office (MC 2399A)

Samuel Coleman
Deputy Regional Administrator
Region VI, (MC-6RA)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

October 11, 2017

Return Receipt Requested

Certified Mail#: 7015 3010 0001 1267 2347

In Reply Refer to:

EPA File No. 08R-97-R9

(b) (6)

Antioch, CA 94509-5426

Re: Closure of Administrative Complaint No. 08R-97-R9

Dear (b) (6)

This letter is to advise you that the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) (formerly, the Office of Civil Rights (OCR)) administratively closing, as of the date of this letter, EPA File No. 08R-97-R9 against the California Department of Toxic Substances Control (DTSC). This complaint generally alleged that DTSC violated Title VI of the Civil Rights Act of 1964, as amended, 42 United States Code 2000d *et seq.* (Title VI) and EPA's nondiscrimination regulation found at 40 Code of Federal Regulations (C.F.R.) Part 7.

EPA ECRCO is responsible for enforcing several federal civil rights laws that prohibit discrimination on the bases of race, color, national origin (including limited-English proficiency), disability, sex and age in programs or activities that receive federal financial assistance from EPA.

On June 5, 1997, you filed the complaint on behalf of the Chester Street Block Club Association (CSBCA). The complaint specifically alleged that DTSC subjected the African-American and Latino residents of the South Prescott Park neighborhood in Oakland, California to discrimination based on race, color, or national origin when it approved the California Department of Transportation's (CalTrans) Removal Action Work plans (RAWs)¹ for remediation of contaminated soil to meet cleanup criteria for the intended recreational use of developing the area as a park. The complaint further alleged that DTSC discriminated by

¹ Final Feasibility Study/Remedial Action Plan, South Prescott Neighborhood Park (CalTrans March 1998); Final Feasibility Study/Remedial Action Plan Interstate 880, Cypress Replacement Project, Oakland, California (CalTrans June 1995); Final Removal Action Plan, Soundwall Installation, Former SPTCO Rail Yard, Oakland, California (CalTrans May 1997).

approving RAWs which, allegedly, failed to require adequate remediation of South Prescott Park.² The complainant alleged that the choice of remediation to a recreational standard was not adequate given the health of residents and other sources of pollution in the community. Complainants alleged that the recreational cleanup approved in the RAWs for this African American and Latino community would not have been selected for a white community and, even if it was, it would not have the same adverse impacts.³

On September 11, 1997, EPA accepted the complaint for investigation.⁴ As discussed below, ECRCO obtained credible information during the course of this investigation indicating that the issue raised by the complaint has been resolved. EPA's Office of Land and Emergency Management (OLEM) reviewed South Prescott Park's clean-up remedy decision documents and confirmed that the clean-up of the South Prescott Park area exceeded the remediation required to satisfy standards for recreational use. As a result, there are no current issues appropriate for further resolution. Accordingly, EPA File Number 08R-97-R9 is administratively closed as of the date of this letter.⁵

During its investigation, ECRCO gathered and reviewed information relevant to the complaint. This information included the complaint submitted to ECRCO and information relating to the remediation of the South Prescott Park site, including the RAWs, Final Feasibility Study - Remedial Action Plan (FS/RAP), Design and Implementation Plan (RDIP)⁶ and Remediation Completion Report (RCP).⁷

As part of its investigation, ECRCO attempted to contact you on several occasions, both in writing and by telephone, to obtain additional information from you about your concerns and to discuss the remediation of South Prescott Park. However, you did not respond to our attempts to reach out to you.

BACKGROUND

In 1989, the Loma Prieta Earthquake destroyed the double deck Cypress Freeway in Oakland, California.⁸ CalTrans "designed the replacement of the Cypress Freeway so as to circumvent West Oakland, which the original Cypress Freeway had bisected."⁹ The new freeway alignment was planned to pass alongside Oakland's South neighborhood.¹⁰ Therefore, in order to reduce potential noise impacts in the neighborhood, CalTrans, along with local agencies and citizens, proposed a tree-lined green space buffer, which then further evolved into the idea for a landscaped community park with concrete walkways and children's play equipment.¹¹

² Administrative Complaint No. 08R-97-R9 (June 10, 1997)

³ Administrative Complaint No. 08R-97-R9 (June 10, 1997)

⁴ Letter from Rafael DeLeon, Acting Director EPA OCR, to Jesse Huff, Director DTSC (Sept. 11, 1997).

⁵ ECRCO Case Resolution Manual, § 3.4 (January 12, 2017).

⁶ Remedial Design and Implementation Plan (RDIP), South Prescott Neighborhood Park (CalTrans August 1999).

⁷ South Prescott Neighborhood Park Remediation Completion Report (RCP) (CalTrans May 18, 2001).

⁸ *Id.* at 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

In 1992, CalTrans began subsurface investigation of the areas to be included in the park. These areas included “two automobile salvage yards, a portion of a railroad yard, and abandoned former residential lots.”¹² During the investigation of the areas, CalTrans found that lead and polynuclear aromatic hydrocarbons were site-wide contaminants that required remediation.”¹³ In addition, the investigation found the existence of pesticide chlordane, diesel fuel, higher boiling point petroleum hydrocarbons, volatile aromatics, volatile aliphatic hydrocarbons, and polychlorinated biphenyls, but to a much lesser extent.¹⁴ CalTrans used the findings of the site investigation to develop a risk assessment in 1997.¹⁵ Based on the risk assessment, CalTrans established cleanup goals for the site that reduced the estimated health risks to “acceptable protective levels.”¹⁶

CalTrans then submitted a Final Feasibility Study/ Remedial Action Plan (FS/RAP) to the DTSC in March 1998.¹⁷ The FS/RAP recapped the findings of previous site assessments and outlined the results of the remedial alternatives available. These were:

Alternative 1: No Action

Alternative 2: Soil Excavation with Off-Site Disposal

Alternative 3: Soil Excavation with Off-Site Thermal Desorption Treatment and Disposal.¹⁸

The FS/RAP outlined the following: contaminants of concerns (COCs) (both carcinogenic and non-carcinogenic); receptors; the pathways; Remedial Action Objectives (RAOs); and the final remedy selected. The COC’s identified were as follows:

Carcinogenic:

1-Metals (arsenic, beryllium)

2-PCBs (aroclor 1254, aroclor 1260)

3-Pesticides (chlordane, DEE, DDT, Dieldrin Heptachlor, and others)
and

Non-Carcinogenic:

1-Metals (antimony, cadmium, Cooper, Lead, Nickel, Thallium, and Zinc.

2-SVOCs (Anthracene, Phenanthrene, Pyrene)¹⁹

The FS/RAP stated that the future land use was anticipated to be recreational, and as such, cleanup levels were set for that use. To that end, CalTrans explained that Alternative 2 had been selected “because it will meet the Remedial Action Objectives (RAOs), will be protective of

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Final Feasibility Study/ Remedial Action Plan (FS/RAP) (Cal Trans March 1998)

¹⁸ *Id.* at 4-5.

¹⁹ *Id.* at 4.

human health and the environment and complies with Applicable or Relevant and Appropriate Requirement (ARARs).²⁰ DTSC approved the cleanup criteria for the intended recreational use²¹ and in 1999, remedial excavation work began at the site.

Site Remediation

As set forth in the RCP, “areas containing excessive levels of contamination were excavated, the soils removed to a designated stockpile site, and confirmation samples collected from within the excavations.”²² In November 1999, the excavators removed a total of “17,000 yd³ of soil over the next 2-plus months.”²³ During the course of the remedial excavations, two underground storage tanks were found near the site of South Prescott Neighborhood Park. The excavators removed the tanks and a groundwater study was conducted in which was “found no lasting contamination problems associated with the tanks.”²⁴ CalTrans reported that “[s]tatistical analyses of the confirmation sample analytical results indicate that the cleanup goals for the park were easily met.”²⁵

As a result of the removal of the contaminated soil, the cleanup results reached for the park were:²⁶

Contaminant	Cleanup Goal	95%UCL**
Lead	400 mg/kg*	264 mg/kg
Arsenic	19.0 mg/kg	5.6 mg/kg
Chlordane	1.77 mg/kg	.29 mg/kg
Benzo(a)pyrene	.40 mg/kg	.10 mg/kg

* With no single result over 840 mg/kg

** Upper confidence limits (UCL) on the true mean concentrations after the remediation was completed.

²⁰ *Id.* at 11. The FS/RAP explains:

Remedial Action Objectives (RAOs) are goals developed for media-specific or area-specific protection of human health and the environment. RAOs for protecting public health address both chemical concentrations and potential exposure routes. Protection can be achieved by either reducing concentrations and/or reducing potential exposures. RAOs for protecting the environment typically seek to minimize impacts on resources by addressing the media of concern and the target cleanup levels. RAOs are developed from information obtained from previous investigations, review of pertinent laws, regulations and other criteria. The RAO for the Site is to reduce the immediate risks to human health and to reduce potential sources of shallow groundwater contamination. *Id.* at 54.

²¹ See RDIP §1.3, at 2.

²² RCP, at 1.

²³ *Id.*

²⁴ *Id.* at 1-2.

²⁵ *Id.* at 2.

²⁶ *Id.*

CalTrans reported that the “the excavated soils were taken to a designated nearby stockpile site for disposal characterization sampling.”²⁷

The final remediation step was “the emplacement of a 3-foot-thick cover of clean, imported soil over the entire graded, post-excavation park site.”²⁸ The material used for the cover came from a 20-foot-deep excavation made for the replacement Cypress Freeway/Seventh Street undercrossing near the park site and a quarry located in Fremont, California.²⁹ According to the RCP, “both sources were tested and approved for use as cover material at the park site by the City of Oakland and DTSC.”³⁰

Results of Site Remediation

In October 2000, the construction for the South Prescott Park was completed and it was deeded to the City of Oakland.³¹ In May 25, 2001, DTSC asserted that all appropriate response actions had been completed, all acceptable engineering practices had been implemented and that no further removal/remedial action is necessary.³²

Based on its review of the available information referenced above, EPA determined that DTSC achieved a degree of cleanup originally included in the cleanup plan. Furthermore, based upon review of the confirmation sampling results, OLEM confirmed on February 22, 2017, that risk-based soil cleanup levels based on recreational future land use for four risk driver contaminants (lead, arsenic, chlordane, and benzo(a)pyrene) either met or were below the FS/RAP cleanup levels. In addition, the excavated areas were backfilled with 3 feet of imported clean fill over the entire park site and soil sources were tested and approved for use as cover material at the park. Therefore, as the remediation has exceeded what was required under the FS/RAP, the allegation accepted for investigation stemming from the remedy selected in the FS/RAP is no longer grounded in fact.

Conclusion

Based on the foregoing, there are no current issues appropriate for further resolution. Accordingly, ECRCO is administratively closing this complaint (EPA File No. 08R-97-R9) as of the date of this letter.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Remedial Action Certification Form (CalTrans May 25, 2001).

This letter sets forth EPA's disposition of the referenced complaint. This letter is not a formal statement of EPA policy and should not be relied upon, cited, or construed as such. Please do not hesitate to contact me at (202) 564-9649, or at Dorka.Lilian@epa.gov, regarding any questions you may have.

Sincerely,



Lilian S. Dorka,
Director
External Civil Rights Compliance Office
Office of General Counsel

Cc: Kenneth Redden
Acting Associate General Counsel
Civil Rights and Finance Law Office

Deborah Jordan
Acting Deputy Regional Administrator
Acting Deputy Civil Rights Official
EPA, Region 9



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

October 11, 2017

Return Receipt Requested

Certified Mail#: 7015 3010 0001 1267 2461

In Reply Refer to:

EPA File No. 08R-97-R9

Barbara A. Lee, Director
Department of Toxic Substances Control
P.O. Box 806
Sacramento, CA 95812-0806

Re: Closure of Administrative Complaint No. 08R-97-R9

Dear Director Lee:

This letter is to advise you that the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) (formerly, the Office of Civil Rights (OCR)) is administratively closing, as of the date of this letter, EPA File No. 08R-97-R9 against the California Department of Toxic Substances Control (DTSC). This complaint generally alleged that DTSC violated Title VI of the Civil Rights Act of 1964, as amended, 42 United States Code 2000d *et seq.* (Title VI) and EPA's nondiscrimination regulation found at 40 Code of Federal Regulations (C.F.R.) Part 7.

EPA ECRCO is responsible for enforcing several federal civil rights laws that prohibit discrimination on the bases of race, color, national origin (including limited-English proficiency), disability, sex and age in programs or activities that receive federal financial assistance from EPA.

On June 5, 1997, EPA received a complaint that was filed on behalf of the Chester Street Block Club Association (CSBCA). The complaint specifically alleged that DTSC subjected the African-American and Latino residents of the South Prescott Park neighborhood in Oakland, California to discrimination based on race, color, or national origin when it approved the California Department of Transportation's (CalTrans) Removal Action Work plans (RAWs)¹ for remediation of contaminated soil to meet cleanup criteria for the

¹ Final Feasibility Study/Remedial Action Plan, South Prescott Neighborhood Park (CalTrans March 1998); Final

intended recreational use of developing the area as a park. The complaint further alleged that DTSC discriminated by approving the RAWs which, allegedly, failed to require adequate remediation of South Prescott Park.² The complaint alleged that the choice of remediation to a recreational standard was not adequate given the health of residents and other sources of pollution in the community. The complaint also alleged that the recreational cleanup approved in the RAWs for this African American and Latino community would not have been selected for a white community and, even if it was, it would not have the same adverse impacts.³

On September 11, 1997, EPA accepted the complaint for investigation.⁴ As discussed below, ECRCO obtained credible information during the course of this investigation indicating that the issue raised by the complaint has been resolved. EPA's Office of Land and Emergency Management (OLEM) reviewed South Prescott Park's clean-up remedy decision documents and confirmed that the clean-up of the South Prescott Park area exceeded the remediation required to satisfy standards for recreational use. As a result, there are no current issues appropriate for further resolution. Accordingly, EPA File Number 08R-97-R9 is administratively closed as of the date of this letter.⁵

During its investigation, ECRCO gathered and reviewed information relevant to the complaint. This information included the complaint submitted to ECRCO and information relating to the remediation of the South Prescott Park site, including the RAWs, Final Feasibility Study - Remedial Action Plan (FS/RAP), Design and Implementation Plan (RDIP)⁶ and Remediation Completion Report (RCP).⁷

As part of its investigation, ECRCO attempted to contact the complainant on several occasions, both in writing and by telephone, to obtain additional information from the complainant about its concerns and to discuss the remediation of South Prescott Park. However, the complainant did not respond to our attempts to reach out to the complainant.

BACKGROUND

In 1989, the Loma Prieta Earthquake destroyed the double deck Cypress Freeway in Oakland, California.⁸ CalTrans "designed the replacement of the Cypress Freeway so as to circumvent West Oakland, which the original Cypress Freeway had bisected."⁹ The new freeway alignment

Feasibility Study/Remedial Action Plan Interstate 880, Cypress Replacement Project, Oakland, California (CalTrans June 1995); Final Removal Action Plan, Soundwall Installation, Former SPTCO Rail Yard, Oakland, California (CalTrans May 1997).

2 Administrative Complaint No. 08R-97-R9 (June 10, 1997)

3 Administrative Complaint No. 08R-97-R9 (June 10, 1997)

4 Letter from Rafael DeLeon, Acting Director EPA OCR, to Jesse Huff, Director DTSC (Sept. 11, 1997).

5 ECRCO Case Resolution Manual, § 3.4 (January 12, 2017).

6 Remedial Design and Implementation Plan (RDIP), South Prescott Neighborhood Park (CalTrans August 1999).

7 South Prescott Neighborhood Park Remediation Completion Report (RCP) (CalTrans May 18, 2001).

8 *Id.* at 1.

9 *Id.*

was planned to pass alongside Oakland's South neighborhood.¹⁰ Therefore, in order to reduce potential noise impacts in the neighborhood, CalTrans, along with local agencies and citizens, proposed a tree-lined green space buffer, which then further evolved into the idea for a landscaped community park with concrete walkways and children's play equipment.¹¹

In 1992, CalTrans began subsurface investigation of the areas to be included in the park. These areas included "two automobile salvage yards, a portion of a railroad yard, and abandoned former residential lots."¹² During the investigation of the areas, CalTrans found that lead and polynuclear aromatic hydrocarbons were site-wide contaminants that required remediation."¹³ In addition, the investigation found the existence of pesticide chlordane, diesel fuel, higher boiling point petroleum hydrocarbons, volatile aromatics, volatile aliphatic hydrocarbons, and polychlorinated biphenyls, but to a much lesser extent.¹⁴ CalTrans used the findings of the site investigation to develop a risk assessment in 1997.¹⁵ Based on the risk assessment, CalTrans established cleanup goals for the site that reduced the estimated health risks to "acceptable protective levels."¹⁶

CalTrans then submitted a Final Feasibility Study/ Remedial Action Plan (FS/RAP) to the DTSC in March 1998.¹⁷ The FS/RAP recapped the findings of previous site assessments and outlined the results of the remedial alternatives available. These were:

Alternative 1: No Action

Alternative 2: Soil Excavation with Off-Site Disposal

Alternative 3: Soil Excavation with Off-Site Thermal Desorption Treatment and Disposal.¹⁸

The FS/RAP outlined the following: contaminants of concerns (COCs) (both carcinogenic and non-carcinogenic); receptors; the pathways; Remedial Action Objectives (RAOs); and the final remedy selected. The COC's identified were as follows:

Carcinogenic:

1-Metals (arsenic, beryllium)

2-PCBs (aroclor 1254, aroclor 1260)

3-Pesticides (chlordane, DEE, DDT, Dieldrin Heptachlor, and others)

and

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Final Feasibility Study/ Remedial Action Plan (FS/RAP) (Cal Trans March 1998)

¹⁸ *Id.* at 4-5.

Non-Carcinogenic:

- 1-Metals (antimony, cadmium, Cooper, Lead, Nickel, Thallium, and Zinc.
- 2-SVOCs (Anthracene, Phenanthrene, Pyrene)¹⁹

The FS/RAP stated that the future land use was anticipated to be recreational, and as such, cleanup levels were set for that use. To that end, CalTrans explained that Alternative 2 had been selected “because it will meet the Remedial Action Objectives (RAOs), will be protective of human health and the environment and complies with Applicable or Relevant and Appropriate Requirement (ARARs).”²⁰ DTSC approved the cleanup criteria for the intended recreational use²¹ and in 1999, remedial excavation work began at the site.

Site Remediation

As set forth in the RCP, “areas containing excessive levels of contamination were excavated, the soils removed to a designated stockpile site, and confirmation samples collected from within the excavations.”²² In November 1999, the excavators removed a total of “17,000 yd³ of soil over the next 2-plus months.”²³ During the course of the remedial excavations, two underground storage tanks were found near the site of South Prescott Neighborhood Park. The excavators removed the tanks and a groundwater study was conducted in which was “found no lasting contamination problems associated with the tanks.”²⁴ CalTrans reported that “[s]tatistical analyses of the confirmation sample analytical results indicate that the cleanup goals for the park were easily met.”²⁵

As a result of the removal of the contaminated soil, the cleanup results reached for the park were:²⁶

Contaminant	Cleanup Goal	95%UCL**
Lead	400 mg/kg*	264 mg/kg
Arsenic	19.0 mg/kg	5.6 mg/kg

¹⁹ *Id.* at 4.

²⁰ *Id.* at 11. The FS/RAP explains:

Remedial Action Objectives (RAOs) are goals developed for media-specific or area-specific protection of human health and the environment. RAOs for protecting public health address both chemical concentrations and potential exposure routes. Protection can be achieved by either reducing concentrations and/or reducing potential exposures. RAOs for protecting the environment typically seek to minimize impacts on resources by addressing the media of concern and the target cleanup levels. RAOs are developed from information obtained from previous investigations, review of pertinent laws, regulations and other criteria. The RAO for the Site is to reduce the immediate risks to human health and to reduce potential sources of shallow groundwater contamination. *Id.* at 54.

²¹ See RDIP §1.3, at 2.

²² RCP, at 1.

²³ *Id.*

²⁴ *Id.* at 1-2.

²⁵ *Id.* at 2.

²⁶ *Id.*

Chlordane	1.77 mg/kg	.29 mg/kg
Benzo(a)pyrene	.40 mg/kg	.10 mg/kg

* With no single result over 840 mg/kg

** Upper confidence limits (UCL) on the true mean concentrations after the remediation was completed.

CalTrans reported that the “the excavated soils were taken to a designated nearby stockpile site for disposal characterization sampling.”²⁷

The final remediation step was “the emplacement of a 3-foot-thick cover of clean, imported soil over the entire graded, post-excavation park site.”²⁸ The material used for the cover came from a 20-foot-deep excavation made for the replacement Cypress Freeway/Seventh Street undercrossing near the park site and a quarry located in Fremont, California.²⁹ According to the RCP, “both sources were tested and approved for use as cover material at the park site by the City of Oakland and DTSC.”³⁰

Results of Site Remediation

In October 2000, the construction for the South Prescott Park was completed and it was deeded to the City of Oakland.³¹ In May 25, 2001, DTSC asserted that all appropriate response actions had been completed, all acceptable engineering practices had been implemented and that no further removal/remedial action is necessary.³²

Based on its review of the available information referenced above, EPA determined that DTSC achieved a degree of cleanup originally included in the cleanup plan. Furthermore, based upon review of the confirmation sampling results, OLEM confirmed on February 22, 2017, that risk-based soil cleanup levels based on recreational future land use for four risk driver contaminants (lead, arsenic, chlordane, and benzo(a)pyrene) either met or were below the FS/RAP cleanup levels. In addition, the excavated areas were backfilled with 3 feet of imported clean fill over the entire park site and soil sources were tested and approved for use as cover material at the park. Therefore, as the remediation has exceeded what was required under the FS/RAP, the allegation accepted for investigation stemming from the remedy selected in the FS/RAP is no longer grounded in fact.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Remedial Action Certification Form (CalTrans May 25, 2001).

Conclusion

Based on the foregoing, there are no current issues appropriate for further resolution. Accordingly, ECRCO is administratively closing this complaint (EPA File No. 08R-97-R9) as of the date of this letter.

This letter sets forth EPA's disposition of the referenced complaint. This letter is not a formal statement of EPA policy and should not be relied upon, cited, or construed as such. Please do not hesitate to contact me at (202) 564-9649, or at Dorka.Lilian@epa.gov, regarding any questions you may have.

Sincerely,



Lilian S. Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel

cc: Kenneth Redden
Acting Associate General Counsel
Civil Rights and Finance Law Office

Deborah Jordan
Acting Deputy Regional Administrator
Acting Deputy Civil Rights Official
EPA, Region 9



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

January 19, 2017

Return Receipt Requested

Certified Mail# 70153010000112675201

In Reply Refer to:

EPA File No. 09R-02-R6

(b) (6)

Santa Fe, NM 87501-1817

Dear (b) (6)

This letter is to inform you that the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) is resolving this complaint based on the enclosed Informal Resolution Agreement (Agreement) entered into between EPA and the New Mexico Environment Department (NMED). On June 27, 2005, EPA accepted your complaint, No. 09R-02-R6, which alleged discrimination based on race and national origin in violation of Title VI and EPA regulation at 40 C.F.R. Part 7 relating to NMED's issuance of a treatment, storage and disposal permit to Gandy-Marley, Inc. (GMI) on March 18, 2002. Specifically, the allegations accepted for investigation were:

- Whether NMED failed to require or perform a scientific investigation into possible disparate impacts;
- Whether NMED failed to ensure that limited-English proficient Spanish speaking residents were provided a meaningful opportunity for effective public participation (through use of notice of public hearings and interpretation and translation services) in the permitting process; and
- Whether NMED has a statewide pattern and practice of similar discriminatory permitting and lack of access for limited-English proficient residents to the public participation and permitting process.

During the course of EPA's investigation, NMED agreed to enter into an Informal Resolution Agreement in order to resolve this complaint.¹ The enclosed Agreement is entered into by the NMED and the EPA pursuant to the authority granted to EPA under the federal nondiscrimination laws, including Title VI of the Civil Rights Act of 1964, and EPA regulation

¹ See ECRCO's Case Resolution Manual regarding informal resolution of complaints, at https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf.

found at 40 C.F.R. Part 7. It resolves complaint No. 09R-02-R6 and additional concerns identified by EPA. It is understood that the Agreement does not constitute an admission by NMED or a finding by EPA of violations of 40 C.F.R. Part 7.

The enclosed Agreement does not affect NMED's continuing responsibility to comply with Title VI or other federal non-discrimination laws and EPA's regulation at 40 C.F.R. Part 7 nor does it affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not covered by this Agreement. This letter sets forth ECRCO's disposition of the complaint. This letter is not a formal statement of ECRCO policy and should not be relied upon, cited, or construed as such.

If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,



Lilian S. Dorka
Director
External Civil Rights Compliance Office
Office of General Counsel

Cc:

Elise Packard
Associate General Counsel Civil Rights & Finance Law Office
U.S. EPA Office of General Counsel

Samuel Coleman, P.E.
Deputy Regional Administrator and Deputy Civil Rights Official
U.S. EPA Region 6

Enclosure



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460**

**EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL**

**INFORMAL RESOLUTION AGREEMENT
between the
NEW MEXICO ENVIRONMENT DEPARTMENT
and the
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ECRCO Complaint No. 09R-02-R6**

I. PURPOSE AND JURISDICTION

- A. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (Title VI), and United States Environmental Protection Agency's (EPA) regulations at 40 C.F.R. Part 7 prohibit discrimination on the basis of race, color, or national origin in any programs or activities receiving federal financial assistance. The New Mexico Environmental Department (NMED) is a recipient¹ of federal financial assistance from the EPA and is subject to the provisions of Title VI and 40 C.F.R. Part 7.**
- B. On June 27, 2005, EPA accepted complaint No. 09R-02-R6 brought under Title VI and EPA's regulations at 40 C.F.R. Part 7 that alleged discrimination based on race and national origin in violation of Title VI. In response to the complaint, EPA began an investigation of NMED's compliance with Title VI and EPA regulations. During the course of EPA's investigation, NMED agreed to enter into this Informal Resolution Agreement (Agreement) in order to resolve this complaint.**
- C. This Agreement is entered into by NMED and the EPA's External Civil Rights Compliance Office (ECRCO).**
- D. This Agreement is entered into pursuant to the authority granted to EPA under the federal nondiscrimination laws, including Title VI of the Civil Rights Act of 1964, and EPA regulations found at 40 C.F.R. Part 7. It resolves complaint No. 09R-02-R6 and additional concerns identified by EPA. It is understood that this Agreement does not constitute an admission by NMED or a finding by EPA of violations of 40 C.F.R. Part 7.**
- E. NMED is committed to carrying out its responsibilities in a nondiscriminatory manner, in accordance with the requirements of Title VI and the other federal non-discrimination laws enforced by EPA regulation at 40 C.F.R. Part 7. The activities**

¹ Throughout this Informal Resolution Agreement, "Recipient" refers to NMED.

detailed in Section III of this Agreement, which NMED has voluntarily agreed to undertake and implement, are in furtherance of this commitment.

II. BACKGROUND

- A.** On June 27, 2005, EPA accepted complaint No. 09R-02-R6, that alleged discrimination based on race and national origin in violation of Title VI and EPA regulation at 40 C.F.R. Part 7 relating to the issuance of a treatment, storage and disposal (TSD) permit to Gandy-Marley, Inc. (GMI) on March 18, 2002. The complaint alleged that NMED failed to require or perform a scientific investigation into possible disparate impacts; failed to ensure that limited-English proficient Spanish speaking residents were provided a meaningful opportunity for effective public participation (through use of notice of public hearings and interpretation and translation services) in the permitting process; and has a statewide pattern and practice of similar discriminatory permitting and lack of access for limited-English proficient residents to the public participation and permitting process.
- B.** In response to this complaint, EPA initiated an investigation of NMED's compliance with Title VI and EPA regulations at 40 C.F.R. Part 7.
- C.** In addition, during the course of the investigation, EPA reviewed the requirements of 40 C.F.R. Part 7, Subpart D that are foundational elements of a recipient's non-discrimination program and are required for all recipient programs and activities. These include: the designation of at least one person to coordinate its efforts to comply with its non-discrimination obligations under 40 C.F.R. § 7.85(g); adoption of grievance procedures that assure the prompt and fair resolution of complaints alleging civil rights violations under 40 C.F.R. § 7.90; and, continuing notice of non-discrimination under 40 C.F.R. § 7.95.
- D.** Consistent with the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 et seq., the New Mexico Hazardous Waste Act (HWA), NMSA 1978, §§ 74-4-1 to -14, and the associated Hazardous Waste Management regulations, 20.4.1 NMAC, incorporate by reference, among other things, the RCRA implementing federal regulations found at 40 CFR Part 270 – EPA Administered Permit Programs: the Hazardous Waste Permit Program. NMED adheres to the permitting process contained within RCRA, correlated federal regulations, the HWA and the Hazardous Waste Management regulations.
- E.** On March 18, 2002, NMED issued for the first time a Hazardous Waste Facility Permit to GMI, (RCRA Permit No NM0001002484), for the storage, treatment, and disposal of hazardous waste at its proposed facility in southeastern New Mexico. The proposed facility was to be located on approximately 480 acres of land in Chaves County.² The Triassic Park Waste Disposal Facility was not constructed under this permit.³

² NMED Triassic Park <https://www.env.nm.gov/HWB/tpperm.html> (May 10, 2016).

³ <https://www.env.nm.gov/HWB/documents/TriassicPark-PublicNoticeofReceiptofApplication11-29-2011.pdf>.

- F.** On October 17, 2011, GMI submitted to NMED a hazardous waste permit renewal application for the Triassic Park Waste Disposal Facility (Facility). The renewal application proposes a significantly scaled back facility, removing the storage and treatment component of the existing permit, but retaining the ability to dispose of hazardous waste in the proposed hazardous waste landfill. On November 29, 2011, GMI published in major local newspapers that the October 17, 2011 hazardous waste permit renewal application had been submitted to NMED and that it was available for public review. The notice explained that no action or decision was proposed by NMED at that time regarding the permit renewal application.
- G.** NMED issued a letter to GMI on March 14, 2012, indicating that the permit application was determined to be administratively incomplete. On April 30, 2012, GMI submitted a revised permit application to address deficiencies in the NMED Notice of Administrative Incompleteness letter. On May 17, 2012, NMED determined the application to be administratively complete.
- H.** On February 5, 2013, NMED issued a Disapproval Letter to the Permittee on the Part A and B Renewal Application. On July 5, 2013, GMI submitted a revised permit application to address deficiencies in the NMED February 5, 2013 Notice of Disapproval Letter.⁴
- I.** On June 12, 2016, NMED issued Public Notice 16-07, "Notice of Public Comment Period and Opportunity to Request a Public Hearing on a Draft Hazardous Waste Permit for Triassic Park Waste Disposal Facility, EPA ID Number: NM0001002484." The notice stated NMED's intent to issue a Hazardous Waste Permit to GMI as the owner and operator of the Facility to dispose of hazardous waste under RCRA and the HWA. The 60-day comment period was to run from June 15, 2016, through August 14, 2016. During the comment period, any person could submit a request for a public hearing.⁵
- J.** On August 1, 2016, after communications with ECRCO, NMED agreed to extend the public comment period and translate the Fact Sheet into Spanish.
- K.** On August 12, 2016, NMED issued Public Notice 16-10, "Notice of Extended Public Comment Period on a Draft Hazardous Waste Permit for Triassic Park Waste Disposal Facility, EPA ID Number: NM0001002484." This notice extended the period for public comment or to request a public hearing to November 18, 2016. The notice also stated that NMED would issue a future notice announcing a public meeting to be held during the extended comment period.⁶ Public Notice 16-10 was sent out in English and Spanish to NMED's mailing list for the Permit; posted in local newspapers (Roswell Daily Record, Albuquerque Journal and the Carlsbad Current

⁴ NMED Triassic Park <https://www.env.nm.gov/HWB/tpperm.html>

⁵ NMED Triassic Park <https://www.env.nm.gov/HWB/tpperm.html> (August, 16 2016)

⁶ NMED Triassic Park <https://www.env.nm.gov/HWB/tpperm.html> (August, 16 2016)

Argus) in both English and Spanish; read on KUNM radio station in both English and Spanish; and posted in 25 locations in 7 communities.

- L. Also, NMED posted the permit Fact Sheet in Spanish on NMED's website and made it available for review in the Roswell Field Office (1914 W. Second, Roswell, NM 88201), Phone (575) 624-6046). NMED also provided a copy directly to Citizens for Alternatives to Radioactive Dumping (CARD).
- M. NMED held an informational public meeting on the permit on October 22, 2016 in Roswell, NM. At this meeting, members of the community were able to discuss their concerns regarding the permitting of the facility. NMED provided simultaneous interpretation in Spanish for the entire meeting. Hard copies of the presentation, the Fact Sheet (English and Spanish versions), the Administrative Record Index and the Public Notice (English and Spanish versions) were provided to meeting participants.
- N. NMED posted a copy of the presentation from the October 22, 2016 Public Information meeting on its website.⁷
- O. On November 1, 2016, after communications with ECRCO, NMED agreed to extend the public comment period for an additional 60 days, post the Fact Sheets (English and Spanish versions) at 23 different locations, announce the public notice on several radio stations identified by Complainants, and publish the notice in the local newspapers.
- P. The extended comment period will end on January 20, 2017 at 5:00 PM. NMED sent a third Public Notice in English and Spanish to the Hazardous Waste Bureau's notification list for Triassic Park notifying stakeholders of the extension.
- Q. NMED posted the third Public Notice and Fact Sheet (English and Spanish versions) at the locations identified in *Posting Locations for Triassic Park Permit Notices* (See attachment)⁸ as well as NMED's district office in Roswell (1914 W. Second Street, Roswell, NM 88201/Phone (575) 624-6046) and the Roswell Public Library located at 301 N. Pennsylvania Ave., Roswell, New Mexico.

⁷ <https://www.env.nm.gov/HWB/documents/PublicMeetingPresentationonTriassicPark10-22-2016.pdf>

⁸ With the following exceptions:

- a. The Artesia Post Office wouldn't allow NMED to post the Public Notices and Fact Sheet. However, post office staff accepted the documents in case the Post Master made an exception.
- b. The Tatum post Office wouldn't allow NMED to post the Public Notices and Fact Sheet. Previously, the office was unmanned and so NMED was able to leave copies of the Public Notices and Fact Sheet. However, this time NMED was not granted permission to post the documents.
- c. The Roswell post offices wouldn't allow NMED to post the Public Notices and Fact Sheet, but NMED was able to leave copies at the warehouse building.
- d. The Cumberland Cooperative Water Users Association on Hobson Road is now closed, so NMED was unable to post the Public Notices or Fact Sheet at this location.

- R. NMED sent the third Public Notice (Spanish and English versions) to KENW 89.5⁹, KBIM 94.9, and KALN 96.1 radio stations to be read as a public service announcement (PSA).
- S. NMED subsequently purchased 25 spots on KBIM 94.9. A commercial will run during the following time periods: 10 spots - between 11/28 - 12/6; 7 spots - between 12/30 - 1/5; 8 spots - between 1/14-1/20.¹⁰
- T. On November 17, 2016, NMED published¹¹ the third Public Notice in three newspapers¹²: Albuquerque Journal, Roswell Daily Record, and Carlsbad Current Argus.¹³
- U. In addition, NMED clarified that, as stated in Section 2.5.2 (Prohibited Waste Streams) of the Triassic Park Disposal Facility draft permit, radioactive wastes¹⁴ are prohibited from disposal at the facility.
- V. NMED stated that an exposure evaluation was conducted for Triassic Park Waste Disposal Facility EPA ID Number: NM0001002484 as required by 40 C.F.R. §270.10 (j). Also, NMED clarified that Triassic Park Waste Disposal Facility's permit application contains the necessary components in accordance with the HWA and correlated Hazardous Waste Management regulations, which incorporate the federal RCRA regulations.

III. SPECIFIC NMED COMMITMENTS

A. Specific Actions Related to Hazardous Waste Permits

Triassic Facility

- 1. NMED has confirmed that it has carefully reviewed the pending permit application and determined that the application contains all necessary

⁹ NMED requested to purchase radio spots on KENW 89.5. However, KENW, does not sell advertising because they are a public radio station. NMED stated that KENW 89.5 did agree to run the PSA on their Community Calendar which runs each day near the noon hour. KENW 89.5 also committed to running the PSA on their television station and would do their best to "work the announcement into various parts of their broadcast day" until January 20th. NMED stated that KENW 89.5 declined to broadcast the PSA in Spanish because: 1) KENW doesn't broadcast in Spanish and 2) "that's not their audience" (see attached email chain between NMED's Communications Director and the radio station).

¹⁰ NMED attempted to purchase spots on KALN 96.1, but did not receive a response from the station.

¹¹ Albuquerque Journal (<http://legals.abqjournal.com/legals/show/377233>); Roswell Daily Record (http://www.publicnoticeads.com/NM/search/view.asp?T=PN&id=3099/11172016_23787235.htm); Carlsbad Current Argus (http://www.publicnoticeads.com/NM/search/view.asp?T=PN&id=3036/11172016_23786824.htm) - English only

¹² NMED was unable to find a Spanish-only periodical near the proposed facility.

¹³ Public Notices usually appear in the classified section of these newspapers on the day of issuance.

¹⁴ RCRA Permit Number: NM0001002484 NMED: Radioactive/nuclear materials regulated by the NMED and defined in 20.3.14.7 NMAC; or other naturally occurring materials which contain radioactivity concentrations above the concentration levels regulated under 20.3.14 NMAC, as specified in Permit Attachment F1, Rationale for Analytical Parameter Section; or materials regulated under the Atomic Energy Act of 1954, as amended (including source, special nuclear materials, and byproduct materials as defined in 10 CFR § 20.1003). Page 25

components of permit applications as required by 40 C.F.R. §270.10, including Section (j) related to "exposure information", and any necessary follow-up has and will be taken to ensure protection of human health and the environment.

2. At the close of the public comment period on January 20, 2017, NMED will review all public comments and will consider holding a public hearing prior to reaching a final decision regarding issuance of the permit. NMED will respond to comments at a public hearing, if a public hearing is held, and, if the permit is issued, at the time of issuance through a formal "Response to Comments."
3. NMED will continue to notify Complainants, in English and in Spanish, about opportunities for public comment and other important actions related to the permitting and operations of the Triassic Park Waste Disposal Facility.
4. NMED will make any changes it deems necessary to the draft permit based upon the public comments received.

Future Modifications to Permit

1. If the current permit is issued, NMED will ensure that the permittee follows the modification requirements established under 40CFR 270.42 for any changes to the permit necessary before the next permit renewal period. This includes any modifications found to be necessary by the permittee to begin actual construction or operation of the facility that are not included in the existing permit at the time of the modification. NMED will ensure that any public notice and public participation requirements associated with a particular modification are adhered to by both the permittee and NMED.
2. NMED will continue to monitor the construction and operation of the Facility to ensure GMI adheres to state and federal rules and any correlated permit issued by NMED.
3. NMED acknowledges that any future actions/decisions regarding whether to issue or deny Triassic Park Facility permit modifications, renewals or other permit decisions, when applicable, must be made on the record after public notice, and opportunity must be given for public comment and the requesting of a public hearing, and in compliance with all applicable state and federal regulations, including civil rights and language access laws and regulations.

B. Access to Vital Information Related to Triassic Facility

1. NMED will make all reasonable efforts to ensure that all "vital"¹⁵ information related to the Triassic Facility Permit Process is accessible to LEP persons in a language they can understand. If it is not reasonable to translate an entire document, NMED must ensure that any vital information contained within such a document will be translated. For the current permitting action, this information may be added to the existing Triassic Park Facility Fact Sheet, translated into Spanish and redistributed to all appropriate facilities as previously identified. (See Section II. (Q) above.)
2. Any vital information regarding the Facility that is readily available to the public in English, whether in written form or orally, will, at a minimum, be available to the non-English speaking public through a qualified interpreter or through translation, depending on the circumstances. NMED is not required to translate all documents posted on its Facility-specific website or in the administrative record.
3. NMED commits to having technical staff available to answer questions from the public about this permit via phone or e-mail and will answer any questions regarding this permit in a language other than English through the timely use of a qualified interpreter provided by NMED. The contact information for such staff will be placed on NMED's facility-specific webpage, and on all public notices and fact sheets.

C. Hazardous Waste Permits in General

- a) NMED will ensure that all permit applications contain necessary components as required by 40 C.F.R. §270.10, including Section (j) related to "exposure information", and necessary follow-up will be taken to ensure protection of human health and the environment.

Non-Discrimination Procedural Safeguards

NMED is in the process of reviewing its non-discrimination procedural safeguards and taking steps to bring its program into compliance within the timeframe set forth below.

D. Notice of Non-Discrimination under the Federal Non-Discrimination Statutes

1. NMED will post a notice of non-discrimination on the NMED website and in general publications that are distributed to the public. In order to ensure effective communication with the public, NMED will ensure that its notice of non-discrimination is accessible to limited-English proficient individuals and individuals with disabilities.

¹⁵ Whether or not a document (or the information it disseminates or solicits) is "vital" may depend upon the importance of the program, information, encounter, or service involved, and the consequence to individual with the LEP if the information in question is not provided accurately or in a timely manner. (See EPA's 2004 *Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Individuals* at <http://www.epa.gov/fdsys/pkg/FR-2004-06-25/pdf/04-14464.pdf>)

2. The notice will contain, at a minimum, the following statements:

- a) NMED does not discriminate on the basis of race, color, national origin, disability, age, or sex in the administration of its programs or activities, as required by applicable laws and regulations.
- b) NMED is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40 C.F.R. Part 7 (Non-discrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency), including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972, and Section 13 of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter referred to collectively as the federal non-discrimination statutes).
- c) If you have any questions about this notice or any of NMED's non-discrimination programs, policies or procedures, you may contact:
 - i. [Insert name and title of Non-Discrimination Coordinator]
 - ii. New Mexico Environmental Department Address Line 1
 - iii. Address Line 2
 - iv. Address Line 3
 - v. Phone number
 - vi. Email address
- d) If you believe that you have been discriminated against with respect to a NMED program or activity, you may contact the [insert title of Non-Discrimination Coordinator] identified above or visit our website at [insert] to learn how and where to file a complaint of discrimination.

3. Within 30 days of the effective date of this Agreement, NMED will publish its notice of non-discrimination on its website as specified above.

E. Grievance Procedures for Complaints filed under the Federal Non-Discrimination Statutes

- 1. NMED will ensure that it has widely and prominently published in print and on-line its grievance procedures to process discrimination complaints filed under federal non-discrimination statutes. NMED will review the grievance procedures on an annual basis (for both in-print and online materials), and revise as necessary, to allow for prompt and appropriate handling of discrimination complaints.
- 2. The grievance procedures will at a minimum address the following:

- a. Clearly identify the Non-Discrimination Coordinator, including contact information;
 - b. Explain the role of the Non-Discrimination Coordinator relative to the coordination and oversight of the grievance procedures;
 - c. State who may file a complaint under the procedures;
 - d. Describe which formal and informal process(es) are available, and the options for complainants in pursuing either;
 - e. Explain that an appropriate, prompt and impartial investigation of any allegations filed under federal non-discrimination statutes will be conducted. (Whether ECRCO considers complaint investigations and resolutions to be "prompt" will vary depending on the complexity of the investigation and the severity and extent of the alleged discrimination. For example, the investigation and resolution of a complaint involving multiple allegations and multiple complainants likely would take longer than one involving a single allegation of discrimination and a single complainant.)
 - f. State that the preponderance of the evidence standard will be applied during the analysis of the complaint;
 - g. Contain assurances that retaliation is prohibited and that claims of retaliation will be handled promptly;
 - h. State that written notice will be promptly provided about the outcome of the investigation, including whether discrimination is found and the description of the investigation process.
3. Within 90 days of the effective date of this Agreement, NMED will forward to ECRCO a final draft of its grievance procedures for review. ECRCO will review the draft procedures and provide any comments within 60 days of receipt.

F. Designation of a Non-Discrimination Coordinator

- 1. NMED will ensure that it has designated at least one Non-Discrimination Coordinator to ensure NMED's compliance with the federal non-discrimination statutes).
- 2. NMED will ensure that its notice and grievance procedures that it has widely published in print and on-line include the title, email address, telephone number, and other contact information of the Non-Discrimination Coordinator. NMED will explain the responsibilities of the Non-Discrimination Coordinator in its grievance procedures adopted pursuant to Section III, Paragraph c of this Agreement.

3. NMED will ensure that the Non-Discrimination Coordinator's responsibilities include the following:
- a) Providing information to individuals internally and externally regarding their right to services, aids, benefits, and participation in any NMED program or activity without regard to their race, national origin, color, sex, disability, age or prior opposition to discrimination;
 - b) Providing notice of NMED's formal and informal grievance processes and the ability to file a discrimination complaint with NMED;
 - c) Establishing grievance policies and procedures or mechanisms (e.g., an investigation manual) to ensure that all discrimination complaints filed with NMED under federal non-discrimination statutes are processed promptly and appropriately. One element of any policy and procedure or mechanism must include meaningful access for limited-English proficient individuals and individuals with disabilities to NMED programs and activities;
 - d) Ensuring the tracking of all discrimination complaints filed with NMED under federal non-discrimination statutes, including any patterns or systemic problems;
 - e) Conducting a semiannual review of all formal and informal discrimination complaints filed with the NMED Non-Discrimination Coordinator under federal non-discrimination statutes and/or any other complaints independently investigated by NMED in order to identify and address any patterns or systemic problems;
 - f) Informing and advising NMED staff regarding NMED's obligations to comply with federal non-discrimination statutes and serve as a resource on such issues;
 - g) Ensuring that complainants are updated on the progress of their discrimination complaints filed with NMED under federal non-discrimination statutes and are promptly informed as to any determinations made;
 - h) Periodically evaluating the efficacy of NMED's efforts to provide services, aids, benefits, and participation in any NMED program or activity without regard to race, national origin, color, sex, disability, age or prior opposition to discrimination;
 - i) Ensuring appropriate training in the formal and informal processes available to resolve complaints filed under federal non-discrimination statutes; and,

- j) Providing or procuring appropriate services to ensure NMED employees are appropriately trained on NMED non-discrimination policies and procedures, as well as the nature of the federal non-discrimination obligations.
- 4. The Non-Discrimination Coordinator will not have other responsibilities that create a conflict of interest (*e.g.*, serving as the Non-Discrimination Coordinator as well as NMED legal advisor or representative on civil rights issues);
- 5. Within 30 days of the effective date of this Agreement, NMED will have designated a Non-Discrimination Coordinator and provided appropriate public notice of such as specified above.
- 6. Within 30 days of appointment of a Non-Discrimination Coordinator, NMED will forward to ECRCO proof that the responsibilities have been included in the incumbent's statement of duties and that the incumbent has accepted the duties.

G. Public Participation

- 1. NMED understands that meaningful public involvement consists of informing, consulting and working with potentially affected and affected communities at various stages of the environmental decision-making process to address their needs. *See* EPA's ECRCO's Public Participation Guidance found at 71 FR 14,207, 14,210 (March 21, 2006). Therefore, NMED will ensure its public involvement process is available to all persons regardless of race, color, national origin (including limited-English proficiency), age, disability, and sex.
- 2. NMED will develop and implement a public participation policy that will require NMED to create and/or carry out each step listed in (a) – (i), below, each time they engage in an action that triggers the public participation process.
 - a) An overview of the Recipient's plan of action for addressing the community's needs and concerns;
 - b) A description of the community¹⁶ (including demographics, history, and background);
 - c) A contact list of agency officials with phone numbers and email addresses to allow the public to communicate via phone or internet;

¹⁶ In order to identify stakeholders in the affected community, the recipient will make a concerted effort to create partnerships with private and public entities to share information in addition to efforts to share information on its website and through standard media outlets. Such information sharing should include communities in the relevant geographic area to the permitted activity; those who have previously expressed an interest in environmental decision making activities; environment and environmental justice organizations; religious institutions and organizations; public administration, environmental, law and health departments at colleges and universities; tribal governments; and relevant community service organizations.

- d) A detailed plan of action (outreach activities) Recipient will take to address concerns;
 - e) A contingency plan for unexpected events;
 - f) Location(s) where public meetings will be held (consider the availability and schedules of public transportation);
 - g) Contact names for obtaining language assistance services for limited-English proficient persons, including translation of documents and/or interpreters for meetings;
 - h) Appropriate local media contacts (based on the culture and linguistic needs of the community); and
 - i) Location of the information repository.
3. Within 60 days of the effective date of this Agreement, NMED will forward to ECRCO a final draft of its public participation process/procedures for review. EPA will review the draft process/procedures and provide any comments within 60 days of receipt.

H. NMED Plan to Ensure Access for Persons with Limited-English Proficiency

1. NMED will develop, publish, and implement written procedures to ensure meaningful access to all of NMED's programs and activities by all persons, including access by limited-English proficient individuals and individuals with disabilities at no cost to those individuals.
2. NMED will conduct the appropriate analysis described in EPA's LEP Guidance found at 69 FR 35602 (June 25, 2004) and <http://www.lep.gov> to determine what language services it may need to provide to ensure that limited-English proficient individuals can meaningfully participate in the process. NMED should develop a language access plan consistent with the details found in ECRCO's training module for LEP. <http://www.epa.gov/civilrights/lepaccess.htm>
3. Within 60 days of the effective date of this Agreement, NMED will forward to ECRCO a final draft of its written procedures to ensure meaningful access to all of NMED's programs and activities by all persons, including access by limited-English proficient individuals and individuals with disabilities. ECRCO will review the draft procedures and provide any comments within 60 days of receipt.

I. NMED Plan to Ensure Access for Persons with Disabilities:

1. NMED will provide at no cost appropriate auxiliary aids and services including, for example, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals as necessary to ensure effective communication or an

equal opportunity to participate fully in the benefits, activities, programs and services provided by NMED in a timely manner and in such a way as to protect the privacy and independence of the individual.

2. Within 60 days of the effective date of this Agreement, NMED will forward to ECRCO a final draft of its written procedures to ensure meaningful access to all of NMED's programs and activities by individuals with disabilities. ECRCO will review the draft procedures and provide any comments within 60 days of receipt.

H. Training

- i. Within 120 days after the effective date of the deliverables identified in this Agreement, including fulfilling the requirements for a Non-Discrimination Coordinator, Non-Discrimination Notice, Grievance Procedures, and Public Participation Process/Procedures, NMED will certify that all appropriate staff have been trained on these processes and procedures and on the nature of the federal non-discrimination obligations.
- ii. Within 90 days after execution of this Agreement, NMED will forward to ECRCO the plan that NMED will put in place to ensure that such training is a routine part of annual or refresher training to appropriate staff.

IV. GENERAL

- A. In consideration of NMED's implementation of commitments and actions described in Section III of this Agreement, EPA will end its investigation of the complaint No. 09R-02-R6 and not issue a decision containing findings on the merits of the complaint.
- B. EPA will, upon request, provide technical assistance to NMED regarding any of the civil rights obligations previously referenced.
- C. EPA will review and provide feedback about any documentation submitted by NMED demonstrating completion of each commitment (*e.g.*, evidence of publication of the designation of the Non-Discrimination Coordinator) and will provide an assessment as to whether the documentation satisfies the commitment.
- D. NMED will report the completion of each commitment identified under Section III consistent with the timeframes in Section III by certified mail to the Director, EPA External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue N.W., Washington D.C. 20460, within 30 days of the completion by NMED of each commitment.
- E. EPA will monitor the implementation of the commitments in this Agreement to ensure they are fully implemented. Once the terms of this Agreement are satisfied,

EPA will issue a letter documenting closure of its monitoring actions in complaint No. 09R-02-R6 and closure of the complaint as of the date of that letter.

V. COMPUTATION OF TIME AND NOTICE

- A.* As used in this Agreement, "day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- B.* Service of any documents required by this Agreement shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.
- C.* Documents submitted by NMED to EPA shall be sent to the Director, U.S. EPA External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue N.W., Washington D.C. 20460.
- D.* Documents submitted by EPA to NMED shall be sent to the Cabinet Secretary, State of New Mexico Environment Department, Harold Runnels Building, 1190 St. Francis Dr., Suite N4050, Santa Fe, NM, 87505, or for U.S. Postal Service, Cabinet Secretary, New Mexico Environment Department, P.O. Box 5469, Santa Fe, New Mexico 87502.

VI. EFFECT OF THE AGREEMENT

- A.* NMED understands that by signing this Agreement, it agrees to provide data and other information in a timely manner in accordance with the reporting requirements of this Agreement. Further, NMED understands that during the monitoring of this Agreement, if necessary, EPA may visit NMED, interview staff, and request such additional reports or data as are necessary for EPA to determine whether NMED has fulfilled the terms of this Agreement and is in compliance with EPA regulations implementing the federal non-discrimination requirements in 40 C.F.R Part 7, which were at issue in this case.
- B.* NMED understands that EPA will close its monitoring of this Agreement when EPA determines that NMED has fully implemented this Agreement and that a failure to satisfy any term in this agreement may result in EPA re-opening the investigation.
- C.* If either Party desires to modify any portion of this Agreement because of changed conditions making performance impractical or impossible, or due to material change to NMED's program or authorities, or for other good cause, the Party seeking a modification shall promptly notify the other in writing, setting forth the facts and circumstance justifying the proposed modification. Any modification(s) to this Agreement shall take effect only upon written agreement by the Director of NMED and the Director of EPA.

- D. This Agreement constitutes the entire Agreement between NMED and EPA regarding the matters addressed herein, and no other statement, promise, or agreement, made by any other person shall be construed to change any commitment or term of this Agreement, except as specifically agreed to by NMED and EPA in accordance with the provisions of Section VI. Paragraph c above.
- E. This Agreement does not affect NMED's continuing responsibility to comply with Title VI or other federal non-discrimination laws and EPA's regulations at 40 CFR Part 7, including § 7.85, nor does it affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not covered by this Agreement.
- F. The effective date of this Agreement is the date by which both Parties have signed the Agreement. This Agreement may be signed in counterparts. The Cabinet Secretary, in his capacity as an official of NMED, has the authority to enter into this Agreement for purposes of carrying out the activities listed in these paragraphs. The Director of ECRCO has the authority to enter into this Agreement.

On behalf of the New Mexico Environmental Department,


Butch Tongate
Secretary-Designate

1/19/17
(Date)

On behalf of the U.S. Environmental Protection Agency,


Lilian S. Dorka

January 19, 2017
(Date)

Director
External Civil Rights Compliance Office
Office of General Counsel



AGENCIA DE PROTECCIÓN AMBIENTAL DE ESTADOS UNIDOS
WASHINGTON, D.C. 20460

OFICINA EXTERNA DE CUMPLIMIENTO DE DERECHOS CIVILES
OFICINA DEL ABOGADO GENERAL

ACUERDO DE RESOLUCIÓN INFORMAL
celebrado entre
EL DEPARTAMENTO AMBIENTAL DE NUEVO MÉXICO
y la
OFICINA EXTERNA DE CUMPLIMIENTO DE DERECHOS CIVILES DE LA AGENCIA
DE PROTECCIÓN AMBIENTAL DE ESTADOS UNIDOS
Denuncia n.º 09R-02-R6

I. OBJETIVO Y JURISDICCIÓN

- A. El título VI de la Ley de Derechos Civiles de 1964, el título 42 del Código de los Estados Unidos (USC, por sus siglas en inglés) §§ 2000d a 2000d-7 (título VI) y las reglamentaciones de la Agencia de Protección Ambiental de Estados Unidos (EPA, por sus siglas en inglés) del título 40 del Código de Regulaciones Federales (CFR, por sus siglas en inglés), parte 7, prohíben la discriminación por raza, color u origen nacional en cualquier programa o actividad que reciba asistencia financiera federal. El Departamento Ambiental de Nuevo México (NMED, por sus siglas en inglés) es un receptor¹ de asistencia financiera federal de la EPA y se encuentra sujeto a las disposiciones del título VI y título 40 del CFR, parte 7.
- B. El 27 de junio de 2005, la EPA aceptó la denuncia n.º 09R-02-R6 interpuesta conforme al título VI y a las reglamentaciones de la EPA estipuladas en el título 40 del CFR, parte 7, la cual alegaba discriminación por raza y origen nacional, y violación del título VI. En respuesta a la denuncia, la EPA comenzó una investigación sobre el cumplimiento de sus reglamentaciones y del título VI por parte del NMED. Durante la investigación llevada a cabo por la EPA, el NMED aceptó celebrar el presente Acuerdo de resolución informal (el Acuerdo) con el fin de resolver esta denuncia.
- C. El presente Acuerdo se celebra entre el NMED y la Oficina Externa de Cumplimiento de Derechos Civiles (ECRCO, por sus siglas en inglés) de la EPA.
- D. El presente Acuerdo se celebra en virtud de la facultad otorgada a la EPA conforme a las leyes federales antidiscriminación, lo que incluye el título VI de la Ley de Derechos Civiles de 1964 y las reglamentaciones de la EPA establecidas en el título 40 del CFR, parte 7. Este Acuerdo resuelve la denuncia n.º 09R-02-R6 y demás asuntos identificados por la EPA. Se entiende que el presente Acuerdo no constituye una admisión por parte del NMED o un hallazgo por parte de la EPA de ninguna violación del título 40 del CFR, parte 7.
- E. El NMED se compromete a cumplir sus responsabilidades de manera no discriminatoria, de acuerdo con los requisitos del título VI y demás leyes federales antidiscriminación aplicadas por la reglamentación de la EPA en el título 40 del CFR, parte 7. Las actividades detalladas en la sección III del presente, que el NMED ha aceptado llevar a cabo e implementar de manera voluntaria, respaldan este convenio.

¹ A lo largo del Acuerdo de resolución informal, el término "Receptor" se refiere al NMED.

II. CONTEXTO

- A. El 27 de junio de 2005, la EPA aceptó la denuncia n.º 09R-02-R6, la cual alegaba discriminación por raza y origen nacional, y la violación del título VI y la reglamentación de la EPA del título 40 del CFR, parte 7, en relación con un permiso de tratamiento, almacenaje y eliminación (TSD, por sus siglas en inglés) para Gandy-Marley, Inc. (GMI) emitido el 18 de marzo de 2002. La denuncia alegaba que el NMED no solicitó ni realizó una investigación científica sobre posibles impactos dispares y no garantizó una significativa oportunidad de participación pública efectiva de los residentes hispanohablantes con dominio limitado del inglés (mediante el uso de avisos de audiencias públicas y servicios de interpretación y traducción) en el proceso de obtención del permiso. Además, exponía que el NMED presenta una práctica y conducta discriminatoria similar en todo el estado respecto de la obtención de permisos y una falta de acceso al proceso de participación pública y obtención del permiso por parte de los residentes con dominio limitado del inglés.
- B. En respuesta a esta denuncia, la EPA comenzó una investigación sobre el cumplimiento por parte del NMED del título VI y las reglamentaciones de la EPA del título 40 del CFR, parte 7.
- C. Además, durante la investigación, la EPA analizó los requisitos del título 40 del CFR, parte 7, párrafo D, los cuales constituyen elementos fundamentales del programa antidiscriminación de un receptor y son obligatorios para todas las actividades y todos los programas de los receptores. Estos requisitos incluyen la designación de al menos una persona que coordine sus esfuerzos para cumplir las obligaciones antidiscriminación en virtud del título 40 del CFR § 7.85(g), la adopción de procedimientos de reclamos que garanticen una resolución justa y rápida de las denuncias que aleguen violaciones de derechos civiles conforme al título 40 del CFR § 7.90 y el aviso antidiscriminación continuo en virtud del título 40 del CFR § 7.95.
- D. De acuerdo con la Ley sobre Conservación y Recuperación de Recursos (RCRA, por sus siglas en inglés), y sus enmiendas, del título 42 del USC, §§ 6901 y siguientes, la Ley de Residuos Peligrosos de Nuevo México (HWA, por sus siglas en inglés), los Estatutos de Nuevo México Anotados (NMSA, por sus siglas en inglés) de 1978, §§ 74-4-1 al -14 y las reglamentaciones relacionadas con el Manejo de Residuos Peligrosos, 20.4.1 del Código Administrativo de Nuevo México (NMAC, por sus siglas en inglés), incorporan por referencia, entre otros, las reglamentaciones federales que implementan la RCRA estipuladas en el título 40 del CFR, parte 270 - Programas de permisos administrados de la EPA: Programa de permiso de residuos peligrosos. El NMED cumple el proceso de obtención de permiso incluido en la RCRA, las reglamentaciones federales relacionadas, la HWA y las reglamentaciones del Manejo de Residuos Peligrosos.
- E. El 18 de marzo de 2002, el NMED emitió por primera vez un Permiso para instalaciones de residuos peligrosos a GMI (Permiso de la RCRA n.º NM0001002484) para el almacenaje, el tratamiento y la eliminación de residuos peligrosos en la instalación propuesta en la zona sureste de Nuevo México. La instalación propuesta debía estar ubicada en aproximadamente 480 acres de tierra en el Condado de Chaves.² La Instalación de eliminación de residuos Triassic Park no se construyó en virtud de este permiso.³

² Triassic Park del NMED <http://www.env.nm.gov/HWB/tpperm.html> (10 de mayo de 2016).

³ <http://www.env.nm.gov/HWB/documents/TriassicPark-PublicNoticeofReceiptofApplication11-29-2011.pdf>

- F. El 17 de octubre de 2011, GMI presentó ante el NMED una solicitud de renovación del permiso para residuos peligrosos para la Instalación de eliminación de residuos Triassic Park (la Instalación). La solicitud de renovación propone una instalación significativamente reducida, que elimina el componente de almacenaje y tratamiento del permiso existente, pero retiene la capacidad de eliminar los residuos peligrosos en el vertedero de residuos peligrosos propuesto. El 29 de noviembre de 2011, GMI publicó en los periódicos locales principales que la solicitud de renovación del permiso de residuos peligrosos se había presentado el 17 de octubre de 2011 ante el NMED y que se encontraba disponible para revisión pública. El aviso explicaba que el NMED no había propuesto ninguna acción ni decisión en ese momento respecto de la solicitud de renovación del permiso.
- G. El NMED emitió una carta a GMI el 14 de marzo de 2012, en la cual indicaba que se había determinado que la solicitud de permiso estaba incompleta en términos administrativos. El 30 de abril de 2012, GMI presentó una solicitud de permiso revisada con el fin de abordar las deficiencias indicadas en la carta del Aviso de inconclusión en términos administrativos enviada por el NMED. El 17 de mayo de 2012, el NMED determinó que la solicitud estaba completa en términos administrativos.
- H. El 5 de febrero de 2013, el NMED emitió una Carta de desaprobación para el Permisionario de las partes A y B de la Solicitud de renovación. El 5 de julio de 2013, GMI presentó una solicitud de permiso revisada con el fin de abordar las deficiencias indicadas en la Carta de aviso de desaprobación enviada por el NMED el 5 de febrero de 2013.⁴
- I. El 12 de junio de 2016, el NMED emitió un Aviso público 16-07, "Aviso sobre período de comentario público y oportunidad de solicitar una audiencia pública respecto del permiso de anteproyecto para la eliminación de residuos peligrosos para la Instalación de eliminación de residuos Triassic Park, número de identificación de la EPA: NM0001002484". El aviso establecía la intención del NMED de emitir un Permiso para residuos peligrosos para GMI en calidad de propietario y operador de la Instalación para eliminar los residuos peligrosos en virtud de la RCRA y la RWA. El período de comentario público de 60 días debía transcurrir entre el 15 de junio de 2016 y el 14 de agosto de 2016. Durante dicho período, cualquier persona podía presentar una solicitud de audiencia pública.⁵
- J. El 1 de agosto de 2016, luego de las comunicaciones con la ECRCO, el NMED aceptó prorrogar el período de comentario público y traducir la Hoja informativa al español.
- K. El 12 de agosto de 2016, el NMED emitió un Aviso público 16-10, "Aviso de prórroga del período de comentario público sobre el permiso de anteproyecto para la eliminación de residuos peligrosos para la Instalación de eliminación de residuos Triassic Park, número de identificación de la EPA: NM0001002484". Este aviso prorrogó el período de comentario público o el plazo para solicitar una audiencia pública hasta el 18 de noviembre de 2016. El aviso también indicaba que el NMED emitiría un aviso en el futuro en el cual anunciaría la realización de una reunión pública durante el período de comentario público prorrogado.⁶ El Aviso público 16-10 se envió en inglés y en español a la lista de correo del NMED para el Permiso,

⁴ Triassic Park del NMED <https://www.env.nm.gov/HWB/tpperm.html>

⁵ Triassic Parte del NMED <https://www.env.nm.gov/HWB/tpperm.html> (16 de agosto de 2016)

⁶ Triassic Park del NMED <https://www.env.nm.gov/HWB/tpperm.html> (16 de agosto de 2016)

se publicó en los periódicos locales (Roswell Daily Record, Albuquerque Journal y Carlsbad Current Argus) en inglés y en español, se leyó en la estación de radio KUNM en inglés y en español, y se publicó en 25 lugares en 7 comunidades.

- L. Además, el NMED publicó la Hoja informativa del permiso en español en el sitio web del NMED y lo proporcionó para su evaluación en la oficina Roswell Field (1914 W, Second, Roswell, NM 88201), teléfono (575) 624-6046). El NMED también proporcionó una copia directamente a los Ciudadanos para Alternativas al Desecho Radioactivo (CARD, por sus siglas en inglés).
- M. El NMED llevó a cabo una reunión pública informativa sobre el permiso el 22 de octubre de 2016 en Roswell, NM. En esta reunión, los miembros de la comunidad pudieron conversar sobre sus preocupaciones respecto de la obtención del permiso de la instalación. El NMED brindó interpretación simultánea en español durante toda la reunión. A los participantes se les proporcionaron copias en papel de la presentación, la Hoja informativa (versiones en inglés y en español), el Índice de registros administrativos y el Aviso público (versiones en inglés y en español).
- N. El NMED publicó una copia de la presentación de la reunión de Información pública llevada a cabo el 22 de octubre de 2016 en su sitio web.⁷
- O. El 1 de noviembre de 2016, luego de intercambiar comunicaciones con la ECRCO, el NMED aceptó prorrogar el período de comentario público por 60 días más, publicar las Hojas informativas (versiones en inglés y en español) en 23 diferentes lugares, anunciar el aviso público en varias estaciones de radio identificadas por los Denunciantes y publicar el aviso en los periódicos locales.
- P. El período de comentario público prorrogado finalizará el 20 de enero de 2017 a las 5:00 de la tarde. El NMED envió un tercer Aviso público en inglés y en español a la lista de notificación de la Oficina de Residuos Peligrosos para que Triassic Park notificara la prórroga a los participantes clave.
- Q. El NMED publicó el tercer Aviso público y la Hoja informativa (versiones en inglés y en español) en los lugares identificados en *Lugares para publicar Avisos sobre permisos para Triassic Park* (Consulte el adjunto⁸ y la oficina de distrito de del NMED en Roswell (1914 W. Second Street, Roswell, NM 88201/Teléfono (575) 624-6046) y la Biblioteca pública de Roswell ubicada en 301 N. Pennsylvania Ave., Roswell, Nuevo México.

⁷ <https://www.env.nm.gov/HWB/documents/PublicMeetingpresentationonTriassicPark10-22-2016.pdf>

⁸ Con las siguientes excepciones:

- a) La oficina de correos en Artesia no permitió que el NMED publicara los Avisos públicos y la Hoja informativa. Sin embargo, el personal de la oficina de correos aceptó los documentos en caso de que el jefe de correos hiciera una excepción.
- b) La oficina de correos en Tatum no permitió que el NMED publicara los Avisos públicos y la Hoja informativa. Anteriormente, no había personal en la oficina; por lo tanto, el NMED pudo dejar las copias de los Avisos públicos y la Hoja informativa. No obstante, esta vez, no autorizaron al NMED a publicar los documentos.
- c) Las oficinas de correos en Roswell no permitieron que el NMED publicara los Avisos públicos y la Hoja informativa; sin embargo, el NMED pudo dejar las copias en el depósito.
- d) La Asociación Cooperativa de Usuarios de Agua de Cumberland ubicada en Hobson Road se encuentra actualmente cerrada; por lo tanto, el NMED no pudo publicar los Avisos públicos ni la Hoja informativa en este lugar.

- R. El NMED envió el tercer Aviso público (versiones en español y en inglés) a las estaciones de radio KENW 89.5⁹, KJBIM 94.9 y KALN 96.1 para que lo leyeran como un anuncio de servicio público (PSA, por sus siglas en inglés).
- S. Posteriormente, el NMED compró 25 anuncios en KBIM 94.9. Un comercial se ejecutará durante los siguientes períodos de tiempo: 10 anuncios entre el 28 de noviembre y el 6 de diciembre, 7 anuncios entre el 30 de diciembre y el 5 de enero, y 8 anuncios entre el 14 de enero y el 20 de enero.¹⁰
- T. El 17 de noviembre de 2016, el NMED publicó¹¹ el tercer Aviso público en tres periódicos¹²: Albuquerque Journal, Roswell Daily Record y Carlsbad Current Argus.¹³
- U. Además, el NMED aclaró que, según se establece en la sección 2.5.2 (Gestión de residuos prohibidos) del permiso de anteproyecto de la Instalación de eliminación de residuos Triassic Park, está prohibida la eliminación de los residuos radioactivos¹⁴ en la instalación.
- V. El NMED manifestó que se llevó a cabo una evaluación de exposición en la Instalación de eliminación de residuos Triassic Park, número de identificación de la EPA NM0001002484, según lo exige el título 40 del CFR §270.10 (j). Además, el NMED aclaró que la solicitud del permiso de la Instalación de eliminación de residuos Triassic Park incluye los componentes necesarios de acuerdo con la HWA y las reglamentaciones de Gestión de residuos peligrosos relacionados, que constituyen las reglamentaciones federales de la RCRA.

III. CONVENIOS ESPECÍFICOS DEL NMED

A. Acciones específicas en relación con los permisos de residuos peligrosos

Instalación Triassic

1. El NMED confirmó que ha evaluado detenidamente la solicitud de permiso pendiente y determinó que la solicitud contiene todos los componentes

⁹ El NMED solicitó comprar anuncios en la radio KENW 89.5. Sin embargo, KENW no vende publicidad, ya que son una estación de radio pública. El NMED manifestó que KENW 89.5 aceptó ejecutar el PSA en su Calendario comunitario, el cual funciona todos los días aproximadamente al mediodía. KENW 89.5 también se comprometió a ejecutar el PSA en su estación de televisión y se esforzaría en "ejecutar el anuncio en varias partes del día de transmisión" hasta el 20 de enero. El NMED manifestó que KENW 89.5 se rehusó a transmitir el PSA en español porque: 1) KENW no transmite en español y 2) "los hispanohablantes no son su audiencia" (consulte la cadena de correos electrónicos adjunta entre el Director de Comunicaciones del NMED y la estación de radio).

¹⁰ El NMED intentó comprar anuncios en KALN 96.1, pero no recibió ninguna respuesta de la estación

¹¹ Albuquerque Journal (<http://legals.abjournal.com/legals/show/377233>); Roswell Daily Record (http://www.punlicnoticeads.com/NM/search/view.asp?T=PN&id=3099/11172016_23787235.html); Carlsbad Current Argus (http://www.punlicnoticeads.com/NM/search/view.asp?T=PN&id=3099/11172016_23787235.html) – Solamente en inglés

¹² El NMED no pudo encontrar un periódico exclusivamente redactado en español cerca de la instalación propuesta.

¹³ Los Avisos públicos habitualmente aparecen en la sección de clasificados de estos periódicos en el día de su emisión.

¹⁴ Número de permiso de la RCRA: NM0001002484 NMED: Los materiales radioactivos o nucleares regulados por el NMED y definidos en el 20.114.7 del NMAC u otros materiales de origen natural que contengan concentraciones de radioactividad por encima de los niveles de concentración regulados conforme al 20.3 14 del NMAC, según se especifica en el permiso adjunto F1, la sección de Fundamentos para parámetros analíticos, o los materiales regulados en virtud de la Ley de Energía Atómica de 1954, y sus enmiendas (lo que incluye la fuente, los materiales nucleares especiales y los materiales derivados, según se define en el título 10 del CFR §20.1003). Página 25

necesarios de las solicitudes de permiso exigidos por el título 40 del CFR §270.10, incluida la sección j) relacionada con la "información sobre exposición". Se ha llevado a cabo, y se realizará, el seguimiento necesario para garantizar la protección de la salud humana y el ambiente.

2. Al cierre del período de comentario público que será el 20 de enero de 2017, el NMED evaluará todos los comentarios públicos y considerará si se llevará a cabo una audiencia pública antes de tomar una decisión definitiva respecto de la emisión del permiso. El NMED responderá los comentarios en una audiencia pública, si esta se lleva a cabo y si se emite el permiso, al momento de su emisión mediante una "Respuesta a comentarios" formal.
3. Luego, el NMED notificará a los Denunciantes, en inglés y en español, las oportunidades de comentario público y demás acciones importantes relacionadas con la obtención del permiso y las operaciones de la Instalación de eliminación de residuos Triassic Park.
4. El NMED realizará los cambios que considere necesarios al anteproyecto del permiso en función de los comentarios públicos recibidos.

Futuras modificaciones al permiso

1. Si se emite el permiso actual, el NMED se asegurará de que el permisionario cumpla los requisitos de modificación establecidos conforme al título 40 del CFR 270.42 para realizar cualquier modificación necesaria al permiso antes del siguiente período de renovación de este. Esto incluye cualquier modificación que el permisionario considere necesaria para comenzar la construcción o el funcionamiento propiamente dichos de la instalación que no se encuentren incluidos en el permiso existente al momento de la modificación. El NMED se asegurará de que el permisionario y el NMED cumplan los requisitos de aviso público y de participación pública relacionados con una modificación específica.
2. El NMED continuará vigilando la construcción y el funcionamiento de la Instalación con el fin de garantizar que GMI cumpla las normas estatales y federales, y cualquier permiso relacionado emitido por el NMED.
3. El NMED reconoce que las acciones o decisiones futuras sobre la emisión o el rechazo de las modificaciones o renovaciones del permiso, o demás decisiones sobre el permiso de la Instalación Triassic Park, cuando corresponda, deben registrarse luego del aviso público, y se debe dar una oportunidad al comentario público y a la solicitud de una audiencia pública, de acuerdo con todas las reglamentaciones federales y estatales aplicables, incluidos los derechos civiles y las reglamentaciones y leyes de acceso lingüístico.

B. Acceso a información fundamental relacionada con la Instalación Triassic

1. El NMED hará todo lo posible para garantizar que toda la información "fundamental"¹⁵ relacionada con el proceso de obtención del permiso para la Instalación Triassic sea accesible para personas con dominio limitado del inglés en un idioma que comprendan. Si no es razonable traducir un documento completo, el NMED debe asegurarse de que se traduzca toda información fundamental incluida en dicho documento. Para la obtención del permiso actual, esta información puede agregarse a la Hoja informativa de la Instalación Triassic Park existente, traducida al español y redistribuida a todas las instalaciones correspondientes según se identificó previamente. (Consulte la sección II. (Q) que antecede).
2. Toda información fundamental respecto de la Instalación que ya se encuentre disponible para el público en inglés, ya sea de forma escrita u oral, deberá, como mínimo, estar disponible para el público que no habla inglés mediante un intérprete calificado o una traducción, según las circunstancias. El NMED no está obligado a traducir todos los documentos publicados en su sitio web específicamente destinado a la Instalación ni en el registro administrativo.
3. El NMED se compromete a disponer de personal técnico para responder las preguntas del público sobre este permiso por teléfono o mediante un correo electrónico, y responderá las preguntas relacionadas con este permiso en otro idioma además del inglés, mediante el uso oportuno de un intérprete calificado proporcionado por el NMED. La información de contacto para dicho personal se encontrará en el sitio web del NMED específicamente destinado a la Instalación y en todos los avisos públicos y hojas informativas.

C. Permisos para residuos peligrosos en general

- a) El NMED se asegurará de que todas las solicitudes de permisos incluyan los componentes necesarios según lo exige el título 40 del CFR §270.10, lo que incluye la sección (j) relacionada con la "información sobre exposición", y de que se llevará a cabo todo seguimiento necesario con el fin de garantizar la protección de la salud humana y el ambiente.

Garantías procesales antidiscriminación

El NMED se encuentra en el proceso de evaluar sus garantías procesales antidiscriminación y de tomar medidas para hacer cumplir este programa dentro del plazo establecido a continuación.

D. Aviso de antidiscriminación conforme a los estatutos federales antidiscriminación

1. El NMED publicará un aviso de antidiscriminación en el sitio web del NMED y en publicaciones generales que se distribuyan al público. Con el fin de garantizar la comunicación efectiva con el público, el NMED se asegurará de que su aviso de antidiscriminación sea accesible para los individuos con dominio limitado del inglés e individuos discapacitados.

¹⁵ El hecho de que un documento (o la información que difunde o solicita) sea "fundamental" depende de la importancia del programa, la información, el encuentro o el servicio involucrado, y la consecuencia para el individuo con dominio limitado del inglés si la información en cuestión no se proporciona de manera precisa u oportuna. (Consulte la Guía para los receptores de asistencia financiera de la Agencia de Protección Ambiental respecto del título VI sobre la prohibición contra la discriminación por origen nacional que afecta a individuos con dominio limitado del inglés de 2004 de la EPA, en <http://www.gpo.gov/fdsys/pkg/FR-2004-06-25/pdf/04-4464.pdf>)

2. El aviso incluirá, como mínimo, las siguientes declaraciones:

- a) El NMED no discrimina por raza, color, origen nacional, discapacidad, edad ni sexo en la administración de sus programas o actividades, según lo exigen las reglamentaciones y leyes aplicables.
- b) El NMED es responsable de la coordinación de esfuerzos tendientes al cumplimiento y de la recepción de consultas en relación con los requisitos antidiscriminación implementados por el título 40 del CFR, parte 7 (Antidiscriminación en programas o actividades que reciben la asistencia federal de la Agencia de Protección Ambiental), incluso el título IV de la Ley de Derechos Civiles de 1964 y sus enmiendas, la sección 504 de la Ley de Rehabilitación de 1973, la Ley contra la Discriminación por Edad de 1975, el título IX de Enmiendas a la Educación de 1972 y la sección 13 de las enmiendas de la Ley Federal de Control de la Contaminación del Agua de 1972 (en adelante, conjuntamente denominados los estatutos federales antidiscriminación).
- c) Si tiene alguna pregunta sobre este aviso o los programas, las políticas o los procedimientos antidiscriminación del NMED, puede comunicarse con:
 - i. [Agregue el nombre y el cargo del Coordinador antidiscriminación]
 - ii. Línea 1 de dirección del Departamento Ambiental de Nuevo México
 - iii. Línea 2 de dirección
 - iv. Línea 3 de dirección
 - v. Número de teléfono
 - vi. Correo electrónico
- d) Si usted considera que lo han discriminado respecto de un programa o actividad del NMED, puede comunicarse con [agregar el cargo del Coordinador antidiscriminación] antes mencionado o puede visitar nuestro sitio web en [agregar] para enterarse cómo y dónde puede presentar una denuncia por discriminación.

3. En el transcurso de los 30 días posteriores a la fecha de entrada en vigencia de este Acuerdo, el NMED publicará su aviso de antidiscriminación en su sitio web según se especificó anteriormente.

E. Procedimientos de reclamación para denuncias presentadas conforme a los estatutos federales antidiscriminación

- 1. El NMED se asegurará de haber publicado de manera extensa y destacada, en papel y en línea, sus procedimientos de reclamación con el fin de tramitar las denuncias por discriminación presentadas conforme a los estatutos federales antidiscriminación. El NMED evaluará los procedimientos de reclamación anualmente (para materiales en línea e impresos), y los revisará según sea necesario, con el fin de permitir el manejo rápido y adecuado de las denuncias por discriminación.
- 2. Los procedimientos de reclamación abordarán, como mínimo, lo siguiente:
 - a. Identificarán claramente al Coordinador antidiscriminación, incluso su información de contacto.

- b. Explicarán el rol del Coordinador antidiscriminación en relación con la coordinación y supervisión de los procedimientos de reclamación.
 - c. Indicarán quién puede presentar una denuncia conforme a los procedimientos.
 - d. Describirán qué procesos formales e informales se encuentran disponibles y las opciones que los denunciantes tienen para llevarlos a cabo.
 - e. Explicarán que se llevará a cabo una investigación adecuada, rápida e imparcial de las manifestaciones presentadas en virtud de los estatutos federales antidiscriminación. (Que la ECRCO considere que las resoluciones e investigaciones de las denuncias deben ser "rápidas" dependerá de la complejidad de la investigación y la gravedad y el alcance de la presunta discriminación. Por ejemplo, la investigación y resolución de una denuncia que involucra varias manifestaciones y varios denunciantes posiblemente lleve más tiempo que una denuncia que involucra una sola manifestación de discriminación y un único denunciante).
 - f. Indicarán que la norma de evidencia irrefutable se aplicará durante el análisis de la denuncia.
 - g. Incluirán garantías de que está prohibido tomar represalias y que las reclamaciones por represalias se atenderán de inmediato.
 - h. Indicarán que el aviso por escrito sobre el resultado de la investigación deberá proporcionarse inmediatamente, y deberá incluir si se descubrió discriminación y la descripción del proceso de investigación.
3. En el transcurso de los 90 días posteriores a la fecha de entrada en vigencia de este Acuerdo, el NMED reenviará a la ECRCO un anteproyecto definitivo de los procedimientos de reclamación para su revisión. La ECRCO revisará los procedimientos del anteproyecto y proporcionará sus comentarios en el transcurso de los 60 días posteriores a la recepción.

F. Designación de un Coordinador antidiscriminación

- 1. El NMED se asegurará de haber designado al menos un Coordinador antidiscriminación para garantizar el cumplimiento de los estatutos federales antidiscriminación del NMED.
- 2. El NMED se asegurará de que los procedimientos de reclamación y avisos que haya publicado extensamente en papel y en línea incluyan el cargo, el correo electrónico, el número de teléfono y demás información de contacto del Coordinador antidiscriminación. El NMED explicará las responsabilidades del Coordinador antidiscriminación en sus procedimientos de reclamación adoptados en virtud de la sección III, párrafo c del presente Acuerdo.
- 3. El NMED se asegurará de que las responsabilidades del Coordinador antidiscriminación incluyan lo siguiente:
 - a) Proporcionar información a individuos de manera interna y externa sobre sus derechos a servicios, recursos, beneficios y participación en actividades o programas del NMED, sin perjuicio de su raza, origen nacional, color, sexo, discapacidad, edad o previa oposición a la discriminación.

- b) Proporcionar avisos sobre los procesos de reclamación formal e informal del NMED y la capacidad de presentar una denuncia por discriminación ante el NMED.
 - c) Establecer procedimientos y políticas o mecanismos de reclamación (*p. ej.*, una investigación manual) con el fin de garantizar que todas las denuncias por discriminación presentadas ante el NMED en virtud de los estatutos federales antidiscriminación se procesen de manera rápida y adecuada. Un elemento de las políticas y los procedimientos o mecanismos debe incluir acceso significativo a las actividades y los programas del NMED por parte de los individuos con dominio limitado del inglés e individuos discapacitados.
 - d) Garantizar el seguimiento de todas las denuncias por discriminación presentadas ante el NMED en virtud de los estatutos federales antidiscriminación, incluso cualquier problema sistemático o patrón.
 - e) Llevar a cabo una evaluación semestral de todas las denuncias formales e informales presentadas ante el Coordinador antidiscriminación del NMED en virtud de los estatutos federales antidiscriminación o demás denuncias investigadas de forma independiente por el NMED con el fin de identificar y abordar cualquier problema sistemático o patrón.
 - f) Informar y aconsejar al personal del NMED sobre las obligaciones del NMED de cumplir los estatutos federales antidiscriminación y desempeñarse como un recurso en dichos asuntos.
 - g) Garantizar que los denunciantes cuenten con información actualizada sobre el progreso de sus denuncias por discriminación presentadas ante el NMED en virtud de los estatutos federales antidiscriminación y que se les informe inmediatamente cualquier determinación tomada.
 - h) Evaluar de forma periódica la eficacia de los esfuerzos del NMED para prestar servicios, recursos, beneficios y participación en las actividades o los programas del NMED, sin perjuicio de raza, origen nacional, color, sexo, discapacidad, edad o previa oposición a la discriminación.
 - i) Garantizar la capacitación adecuada en los procesos formales e informales disponibles para resolver las denuncias presentadas en virtud de los estatutos federales antidiscriminación.
 - j) Proporcionar o procurar los servicios adecuados para garantizar que los empleados del NMED se capaciten de manera apropiada sobre los procedimientos y las políticas antidiscriminación y la naturaleza de las obligaciones federales antidiscriminación.
4. El Coordinador antidiscriminación no tendrá otras responsabilidades que creen conflicto de intereses (*p. ej.*, desempeñarse como Coordinador antidiscriminación y asesor legal del NMED o como representante en asuntos sobre derechos civiles).
 5. En el transcurso de los 30 días posteriores a la fecha de entrada en vigencia de este Acuerdo, el NMED designará un Coordinador antidiscriminación y proporcionará el aviso público correspondiente según se especificó anteriormente.

6. En el transcurso de los 30 días posteriores a la designación del Coordinador antidiscriminación, el NMED reenviará a la ECRCO evidencia de que sus responsabilidades se han incluido en la declaración de obligaciones del actual Coordinador y que dicho Coordinador ha aceptado las responsabilidades.

G. Participación pública

1. El NMED comprende que la participación pública significativa consiste en informar, consultar y trabajar con comunidades afectadas y posiblemente afectadas en varias etapas del proceso de toma de decisiones sobre el medio ambiente con el fin de abordar sus necesidades. *Consulte la* Guía de participación pública de la ECRCO de la EPA incluida en el título 71 de las FR 14,207, 14,210(21 de marzo de 2006). Por lo tanto, el NMED se asegurará de que su proceso de participación pública esté disponible para todas las personas, sin perjuicio de su raza, color, origen nacional (incluso aquellos con dominio limitado del inglés), edad, discapacidad y sexo.
2. El NMED desarrollará e implementará una política de participación pública que le exigirá al NMED crear o llevar a cabo cada etapa enumerada desde la (a) hasta la (i) a continuación, cada vez que se involucren en una acción que desencadene el proceso de participación pública:
 - a) Un resumen del plan de acción del Receptor para abordar las necesidades y los problemas de la comunidad
 - b) Una descripción de la comunidad¹⁶ (incluso la demografía, la historia y el contexto)
 - c) Una lista de contactos de los funcionarios del organismo, incluidos los números de teléfono y los correos electrónicos, para permitir que el público se comuniquen por teléfono o Internet
 - d) Un plan de acción detallado (actividades de participación) que el Receptor llevará a cabo para abordar los problemas
 - e) Un plan alternativo para eventos inesperados
 - f) Los lugares donde se llevarán a cabo las reuniones públicas (se debe considerar la disponibilidad y los horarios del transporte público)
 - g) Los nombres de los contactos para obtener servicios de asistencia lingüística para personas con dominio limitado del inglés, que incluyen la traducción de documentos o intérpretes para las reuniones
 - h) Contactos de los medios locales correspondientes (en función de la cultura y las necesidades lingüísticas de la comunidad)
 - i) La ubicación del centro de información

¹⁶ Para identificar a los participantes clave de la comunidad afectada, el receptor se esforzará por crear asociaciones con entidades públicas y privadas con el fin de compartir información, además de esforzarse por compartir información en su sitio web y a través de medios de comunicación estándar. Dicha información compartida deberá incluir las comunidades en la zona geográfica pertinente a la actividad permitida, aquellas personas que han previamente expresado un interés en la toma de decisiones sobre el medio ambiente, las organizaciones de justicia ambiental, instituciones y organizaciones religiosas, la administración pública, los departamentos legales y de salud de universidades y facultades, gobiernos tribales y organizaciones de servicio a la comunidad pertinentes.

3. En el transcurso de los 60 días posteriores a la fecha de entrada en vigencia de este Acuerdo, el NMED reenviará a la ECRCO un anteproyecto definitivo sobre el proceso o los procedimientos de participación pública para su revisión. La EPA evaluará el anteproyecto sobre el proceso o los procedimientos, y proporcionará sus comentarios en el transcurso de los 60 días posteriores a su recepción.

H. Plan del NMED para garantizar el acceso de personas con dominio limitado del inglés

1. El NMED desarrollará, publicará e implementará procedimientos por escrito para garantizar el acceso significativo a todas las actividades y programas del NMED por parte de todas las personas, incluso acceso gratuito para individuos con dominio limitado del inglés e individuos discapacitados.
2. El NMED llevará a cabo el análisis correspondiente descrito en la Guía para individuos con dominio limitado del inglés de la EPA establecido en el título 69 de las FR 35602 (25 de junio de 2004) y <http://www.epa.gov/civilrights/iepaaccess.htm> con el fin de determinar qué servicios de idioma pueden ser necesarios para garantizar que los individuos con dominio limitado del inglés participen de manera significativa en el proceso. El NMED deberá desarrollar un plan de acceso al idioma de acuerdo con los detalles indicados en el módulo de capacitación de la ECRCO para individuos con dominio limitado del inglés. <http://www.epa.gov/civilrights/iepaaccess.htm>
3. En el transcurso de los 60 días posteriores a la fecha de entrada en vigencia de este Acuerdo, NMED reenviará a la ECRCO un anteproyecto definitivo de los procedimientos por escrito con el fin de garantizar el acceso significativo a todas las actividades y programas de NMED por parte de todas las personas, incluso el acceso por parte de individuos con dominio limitado del inglés e individuos discapacitados. La ECRCO revisará los procedimientos del anteproyecto y proporcionará sus comentarios en el transcurso de los 60 días posteriores a su recepción.

I. Plan del NMED para garantizar el acceso de personas discapacitadas:

1. El NMED proporcionará de manera gratuita servicios y recursos auxiliares adecuados, lo que incluye, p. ej., intérpretes calificados para individuos que sean sordos o que sufran dificultades auditivas, y para otros individuos si fuera necesario, con el fin de garantizar la efectiva comunicación o una oportunidad equitativa para participar de manera absoluta en los beneficios, las actividades, los programas y los servicios proporcionados por el NMED de forma oportuna y de manera que proteja la privacidad y la independencia del individuo.
2. En el transcurso de los 60 días posteriores a la fecha de entrada en vigencia de este Acuerdo, el NMED reenviará a la ECRCO un anteproyecto definitivo de los procedimientos por escrito con el fin de garantizar el acceso significativo a todas las actividades y programas del NMED por parte de los individuos discapacitados. La ECRCO revisará los procedimientos del anteproyecto y proporcionará sus comentarios en el transcurso de los 60 días posteriores a su recepción.

J. Capacitación

- i En el transcurso de los 120 días posteriores a la fecha de entrada en vigencia de los documentos indicados en este Acuerdo, lo que incluye el cumplimiento de los requisitos de un Coordinador antidiscriminación, un Aviso antidiscriminación, los procedimientos de reclamación y los procedimientos o procesos de participación pública, el NMED certificará que todo el personal correspondiente haya recibido capacitación sobre estos procesos y procedimientos, y sobre la naturaleza de las obligaciones federales antidiscriminación.
- ii. En el transcurso de los 90 días posteriores a la firma de este Acuerdo, el NMED reenviará a la ECRCO el plan que el NMED llevará a cabo para garantizar que dicha capacitación sea parte habitual de la capacitación anual o de actualización para el personal correspondiente.

IV. DISPOSICIONES GENERALES

- A. En consideración de la implementación por parte del NMED de los convenios y acciones descritos en la sección III del presente Acuerdo, la EPA finalizará su investigación de la denuncia n.º 09R-02-R6 y no emitirá una decisión que incluya hallazgos sobre el fundamento de la denuncia.
- B. A solicitud, la EPA proporcionará asistencia técnica al NMED respecto de las obligaciones sobre derechos civiles mencionadas previamente.
- C. La EPA evaluará y proporcionará comentarios sobre la documentación presentada por el NMED que demuestre la finalización de cada compromiso (*p. ej.*, evidencia sobre la publicación de la designación del Coordinador antidiscriminación) y brindará una evaluación sobre si la documentación cumple dicho compromiso.
- D. El NMED informará la finalización de cada compromiso identificado en virtud de la sección III de acuerdo con los plazos estipulados en la sección III por correo certificado al Director, a la Oficina Externa de Cumplimiento de Derechos Civiles de la EPA (código postal 2310A), 1200 Pennsylvania Avenue N.W., Washington D.C. 20460, en el transcurso de los 30 días posteriores a la finalización por parte del NMED de cada compromiso.
- E. La EPA supervisará la implementación de los compromisos estipulados en este Acuerdo con el fin de garantizar que se implementen de manera absoluta. Cuando se cumplan los términos de este Acuerdo, la EPA emitirá una carta para documentar el cierre de su supervisión en la denuncia n.º 09R-02-R6 y el cierre de la denuncia a partir de la fecha de dicha carta.

V. CÁLCULO DEL TIEMPO Y AVISOS

- A. Según se utiliza en este Acuerdo, el término "días" significará un día corrido. Cuando se calcule un período de tiempo conforme al presente, en el caso en que el último día sea un sábado, un domingo o un feriado nacional, el período transcurrirá hasta el cierre del día laboral del siguiente día hábil.

- B. Las notificaciones de los documentos exigidas por este Acuerdo se harán de forma personal, por correo certificado con acuse de recibo o mediante cualquier servicio de entrega comercial confiable que proporcione una verificación de la entrega por escrito.
- C. Los documentos presentados por el NMED a la EPA deberán enviarse al Director, a la Oficina Externa de Cumplimiento de Derechos Civiles de la EPA (código postal 2310A), 1200 Pennsylvania Avenue N.W., Washington D.C. 20450.
- D. Los documentos presentados por la EPA ante el NMED deberán enviarse al Secretario de Gabinete, Departamento Ambiental del Estado de Nuevo México, Harold Runnels Building, 1190 St, Francis Dr., Suite N4050, Santa Fe, NM, 87505, o al servicio postal de los Estados Unidos, Secretario de Gabinete, Departamento Ambiental de Nuevo México, P.O. Box 5469, Santa Fe, Nuevo México 87502.

VI. VIGENCIA DEL ACUERDO

- A. El NMED comprende que al firmar el presente Acuerdo, acepta proporcionar datos y demás información de manera oportuna de acuerdo con los requisitos de informe de este Acuerdo. Además, el NMED comprende que durante la supervisión de este Acuerdo, si fuera necesario, la EPA puede visitar al NMED, entrevistar al personal y solicitar datos o informes adicionales que sean necesarios para que la EPA determine si el NMED ha cumplido con los términos de este Acuerdo y que cumple las reglamentaciones de la EPA que implementan los requisitos federales antidiscriminación en el título 40 del CFR, parte 7, que son los asuntos por tratar en este caso.
- B. El NMED entiende que la EPA finalizará su supervisión de este Acuerdo cuando esta determine que el NMED ha implementado de manera absoluta este Acuerdo y que el incumplimiento de cualquier término de este Acuerdo podrá causar la reapertura de la investigación por parte de la EPA.
- C. Si alguna de las Partes desea modificar alguna porción del Acuerdo debido al cambio de algunas condiciones que imposibilita el cumplimiento, o debido a una modificación material de las autoridades o algún programa del NMED, o por algún otro buen motivo, la Parte que solicita la modificación deberá notificar de inmediato a la otra parte por escrito, y deberá describir los hechos y las circunstancias que justifican la modificación propuesta. Toda modificación a este Acuerdo entrará en vigencia solamente mediante un acuerdo por escrito celebrado entre el Director del NMED y el Director de la EPA.
- D. Este Acuerdo constituye el Acuerdo completo entre el NMED y la EPA respecto de los asuntos abordados en el presente, y ninguna declaración, promesa o acuerdo realizado por cualquier otra persona deberá interpretarse que modifica cualquier compromiso o término de este Acuerdo, a excepción de las disposiciones específicamente acordadas por el NMED y por la EPA de acuerdo con las disposiciones de la sección VI. párrafo c que antecede.

- E. El presente Acuerdo no afecta la responsabilidad continua de del NMED de cumplir con el título VI o demás leyes federales antidiscriminación y las reglamentaciones de la EPA estipuladas en el título 40 del CFR, parte 7, hasta § 7.85, y tampoco afecta la investigación por parte de la EPA de ninguna denuncia del título VI o ninguna otra denuncia de derechos civiles federales ni aborda ningún otro asunto que no esté cubierto por este Acuerdo.
- F. La fecha de entrada en vigencia de este Acuerdo es la fecha en la que ambas Partes hayan firmado el Acuerdo. Este Acuerdo puede firmarse en varios ejemplares. El Secretario de Gabinete, en calidad de oficial del NMED, tiene la facultad de celebrar el presente Acuerdo a los fines de realizar las actividades enumeradas en estos párrafos. La Directora de la ECRCO tiene la facultad para celebrar el presente Acuerdo.

En representación del Departamento ambiental de Nuevo México.



Butch Tongate
Secretario-Persona

19/1/17

(Fecha)

En representación de la Agencia de Protección Ambiental



Lilian S. Dorka

Enero 19, 2017

(Fecha)

Directora
Oficina Externa de Cumplimiento de Derechos Civiles
Oficina del Abogado General



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 27 2014

OFFICE OF
CIVIL RIGHTS

Return Receipt Requested

Certified Mail#: 7004-1160-0002-3622-9360

In Reply Refer to:

EPA File No.: 10D-13-R5

Director LaMar Hasbrouck, MD
Illinois Department of Public Health
535 West Jefferson St.
Springfield, Illinois 62761-5085

Re: Rejection of Administrative Complaint

Dear Director Hasbrouck, MD:

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) received an administrative complaint on May 15, 2013, alleging that the Illinois Department of Public Health (IDPH) violated Title VI of the Civil Rights Act of 1964, as amended, and the EPA's nondiscrimination regulations found at 40 C.F.R. Part 7.


Pursuant to the EPA's nondiscrimination regulations, the Office of Civil Rights (OCR) conducts a preliminary review of discrimination complaints to determine acceptance, rejection, or referral (See 40 C.F.R. § 7.120(d)(1)). For a complaint to be accepted for investigation, the complaint must meet the jurisdictional requirements described in the EPA's Part 7 regulations (nondiscrimination regulations).

First, the complaint must be in writing. Second, the complaint must describe an alleged discriminatory act that, if true, would violate the EPA's nondiscrimination regulations (*i.e.*, an alleged discriminatory act based on race, color, national origin, sex, age, or disability). Third, the complaint must be filed within 180 days of the alleged discriminatory act. Finally, the complaint must be filed against an applicant for, or recipient of, EPA assistance that allegedly committed the discriminatory act. For your reference, a copy of the EPA's nondiscrimination regulations is enclosed.

The EPA has concluded that the allegation described in the complaint does not meet jurisdictional requirements because the complaint does not provide evidence of a discriminatory act that is based on race, color, national origin, sex, age, or disability. Should the complainant provide the EPA with additional information which meets the basis of our regulations, an investigation may be initiated evaluating your compliance with 40 C.F.R. Part 7. A copy of these regulations are enclosed with this letter.

If you have questions about this letter, please contact Brittany Martinez at (202) 564-0792, via e-mail at martinez.brittany@epa.gov.

Sincerely,


Velveta Golightly-Howell
Director

Enclosure

cc: Kenneth Redden, Acting Associate General Counsel
Civil Rights & Finance Law Office (MC 2399A)

Bharat Mathur, Deputy Civil Rights Official
Region V (MC R19-J)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
CIVIL RIGHTS

April 22, 2016

Return Receipt Requested

Certified Mail#: 7015-3430-0001-1742-8062

In Reply Refer to:

EPA OCR File No.: 10R-98-R2

The Honorable Jose E. Serrano
Congress of the United States
House of Representatives
2227 Rayburn House Office Building
Washington, D.C. 20515

Re: Letter of Closure of Administrative Complaint

Dear Congressman Serrano:

This letter concerns the administrative complaint submitted to the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) by you on behalf of your constituents in the South Bronx area of New York City, dated May 26, 1998, supplemented on December 23, 1998, and on May 16, 1999. The complaint alleges violations of Title VI of the Civil Rights Act of 1964 (Title VI) as amended, 42 United States Code (U.S.C.) §§ 2000d to 2000d-7, and EPA's implementing regulations found at 42 U.S.C. Part 7, by the New York State Department of Environmental Conservation (NYSDEC)¹ and the New York City Department of Sanitation (DSNY).² This letter addresses the following allegations, which were accepted by OCR against the NYSDEC and DSNY on March 11, 1999, and October 25, 1999, respectively:³

Allegation 1 - NYSDEC's renewal of solid waste permits for the Triboro Fibers facility on February 10, 1998, and renewal of a permit for the A.J.

¹ NYSDEC receives federal funds from EPA.

² Formerly referred to as NYCDOS.

³ Acceptance of Complaint letter from Anne Goode, Director, OCR, EPA to Complainants, NYSDEC (March 11, 1999). See *a/so* Acceptance of Complaint letter from Anne Goode, Director, OCR, EPA to Commissioner Kevin Farrell, DSNY (October 25, 1999).

Recycling facility on May 5, 1998,⁴ results in a discriminatory effect on African Americans and Hispanics.⁵

Allegation 2 - DSNY's renewal of permits for waste transfer stations (WTSs) in the South Bronx contributes to the clustering of WTSs and disproportionate environmental and public health burdens in two predominantly minority community districts while benefiting New York City's predominantly white community districts.⁶

As explained more fully below, OCR is closing this matter against NYSDEC as it relates to the Triboro Fibers facility because the facility located at the 770 Barry Street address location is no longer operational.

OCR is also closing the inquiry into the allegation against NYSDEC as it relates to the permitting of the A.J. Recycling facility based on a number of considerations including: reports submitted to NYSDEC reflecting the facility's reduced contribution to the degradation of regional air quality; special permit conditions and operational changes that have occurred at the facility; and improvements to the general waste management operations. Collectively, these factors show changes in the overall circumstances since the complaint was filed.

Ultimately, there is insufficient evidence to show that the proposed emissions from the A.J. Recycling facility cause or contribute to unhealthy air quality levels or cause or contribute to degradation in local air quality. Accordingly, there is also insufficient evidence to conclude that any emissions from the A.J. Recycling facility's proposed modifications would contribute to air quality impacts in a discriminatory manner on the basis of race, color, or national origin.

In addition, OCR is closing its inquiry into the allegation relating to DSNY because it has not been a recipient of EPA federal financial assistance since December 31, 2000.⁷

I. BACKGROUND

Complainants in this matter are a group identified as "Concerned Citizens." In a letter dated May 26, 1998, Concerned Citizens submitted a Title VI complaint which alleged that the residents living in the South Bronx communities were experiencing

⁴ The original accepted allegation incorrectly identified both facilities as receiving solid waste permit renewals. The A.J. Recycling facility did receive a solid waste permit, but Triboro Fibers was a recyclables handling and recovery facility (RHRF). RHRFs are required to be registered with (rather than permitted by) the NYSDEC. The original allegation did not explain this distinction.

⁵ See footnote 3 above.

⁶ See footnote 3 above.

⁷ According to U.S. EPA's Integrated Grant Management System Database, EPA Region 2 provided a grant to DSNY on September 29, 2000. The project ended on December 31, 2000. Notwithstanding this change in recipient status, this letter will include information about the allegations related to DSNY.

discriminatory environmental and public health burdens due to the number of waste transfer stations located in their communities.⁸ You represent the 15th Congressional District of New York in the Bronx and subsequently provided OCR with supplemental information on behalf of your constituents.⁹

NYSDEC is a recipient of EPA financial assistance. It is empowered to conserve, improve and protect New York state's natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being.

NYSDEC regulates construction and demolition (C&D) debris processing facilities through permitting or registration.¹⁰ Facilities processing uncontaminated C&D debris are registered, and facilities processing C&D debris that is contaminated and/or commingled with other solid waste are permitted. NYSDEC regulates recyclables handling and recovery facilities (RHRFs) solely through registration. NYSDEC also issues permits statewide to WTSs that receive 12,500 tons (50,000 cubic yards) or more of household waste per year, and registers WTSs that receive less than this amount per year.

NYSDEC regulates the A.J. Recycling facility as a permitted C&D debris processing facility. A.J. Recycling facility is located within an area zoned predominantly for manufacturing purposes (M-1 and M-3). According to zoning records, A.J. Recycling is surrounded by an industrial district for at least a quarter of a mile. NYSDEC also regulated the Triboro Fibers facility as a registered RHRF.

As stated above, DSNY has not been a recipient of EPA federal financial assistance since December 31, 2000. However, it is responsible for managing New York City's solid waste, which includes garbage and recycling collection, street cleaning, and snow removal. Title 16, Chapter 4 of the Rules of the City of New York identifies the rules and regulations promulgated by DSNY applicable to transfer stations, including but not limited to C&D debris transfer stations, such as A.J. Recycling. DSNY has promulgated general and specific regulations applicable to non-putrescible solid WTSs, C&D debris transfer stations and fill material transfer stations, putrescible solid waste transfer stations, and intermodal solid waste container facilities (facilities served by rail or vessel transporting containerized solid waste).

COMPLAINANT'S ALLEGATIONS AND SUPPORTING INFORMATION

The Concerned Citizens complaint named both DSNY and NYSDEC as respondents because they issued construction and operation permits to the facilities.

⁸ Letter from Concerned Citizens to Jeanne M. Fox, EPA Regional Administrator, Region 2 (May 26, 1998).

⁹ This information is discussed further below.

¹⁰ New York State regulations pertaining to solid waste management facilities, including WTSs, C&D debris processing facilities, and RHRFs, are found in the New York Code of Rules and Regulations Part 360.

Specifically, the complaint states that NYSDEC issued a renewal for the Triboro Fibers facility and a permit for the A.J. Recycling facility within 180 calendar days prior to the filing of the Title VI complaint.¹¹ In your December 23, 1998 letter, you alleged that permitting actions by DSNY and NYSDEC were specific discriminatory acts that occurred within 180 calendar days prior to the May 29, 1998 complaint filing.¹²

The complaint asserts that there were over sixty waste facilities in Community Boards 1 and 2,¹³ including approximately thirty-five WTSs, several sewage treatment plants, a major bio-solids processing facility, numerous automotive yards, and metal finishing shops.¹⁴ Additionally, the complaint states that the area has more land zoned for M-3 usage (land reserved by the city for the most noxious uses) than any other area in the city.¹⁵

The complaint further states that based on the 1990 U.S. Census, the district has a total population of 581,053, of whom 342,897 (59.0%) are Hispanic and 199,808 (34.4%) are African American. The complaint also states that these minority groups make up 95% of the Congressional District and that Community Board 1 has a total population of 77,214, of whom 51,627 (66.9%) are Hispanic and 23,356 (30.5%) are African American. According to the complaint, Community Board 2 has a total population of 39,443, of whom 31,115 (78.9%) are Hispanic and 7,463 (9.7%)¹⁶ are African American.

Finally, the complaint outlines the alleged health impacts experienced by the residents of the South Bronx, which include increases in:

- asthma rates;
- respiratory diseases;
- pneumonia;
- influenza; and
- skin/breast cancer.¹⁷

¹¹ Letter from Congressman Jose E. Serrano *et al.* to Anne Goode, Director, OCR, EPA (December 23, 1998). During the course of its investigation, OCR learned that the Triboro Fibers facility, which is a RHRF, was only registered with the state and was not permitted.

¹² Letter from Concerned Citizens to Jeanne M. Fox, EPA Regional Administrator, Region 2 (May 26, 1998).

¹³ Community Boards 1 and 2 occupy the south-southwest tip of the Bronx, along the East River from the outlet of the Hudson River to the outlet of the Bronx River. They include the Port Morris, Mott Haven, Melrose, and Hunts Point neighborhoods.

¹⁴ Letter from Congressman Serrano to Anne Goode, Director, OCR, EPA (December 23, 1998).

¹⁵ Letter from Concerned Citizens to Jeanne M. Fox, EPA Regional Administrator, Region 2 (May 26, 1998).

¹⁶ According to the 1990 Census data, the percentage for African Americans in Community Board 2 was 19%.

¹⁷ Administrative Complaint supplement letter from Congressman Serrano to Ann Goode, Director, OCR, EPA, page 4. (December 23, 1998).

The complaint cites statistics compiled in various studies conducted in the 1980s and 1990s by the New York State Department of Health (NYSDOH), the United Hospital Fund, and the Mount Sinai Medical Center, which describe the Hunts Point and Mott Haven communities as suffering the highest hospitalization rates for asthma in New York, as well as the United States.¹⁸

In addition, the complaint cites to: "1) a 1993 study depicting the asthma hospitalization rate for children ages 0-17 years old in these communities was over 18 per 1,000 on average, more than three times the national rate for this age group, and over twice the city rate; and 2) a 1998 health study conducted by the Hunts Point Childhood Health Promotion Initiative and the NYSDOH that included the responses of over 2,500 children attending three public schools in Hunts Point, which found that over 21% of the children surveyed have asthma."¹⁹

EPA'S ACTIONS BETWEEN 1998 – 2009

When the waste transfer station issues were brought to EPA's attention, the community alleged it was suffering from air quality, traffic, litter, noise and other impacts resulting from the proliferation of waste transfer stations in the South Bronx. Moreover, with the prospect of closing Staten Island's Fresh Kills landfill (the nation's largest at the time), the affected community was apprehensive about the Fresh Kills landfill closure exacerbating the conditions for the South Bronx. EPA worked with the community on an ongoing basis to provide technical assistance on waste management and air quality. For example, EPA Region 2 served in an ombudsman role to channel community concerns to the appropriate city and state agencies for action. EPA Region 2 also served on the City's Fresh Kills Closure Task Force and raised community concerns.

In November 1998, EPA Region 2 co-organized a National Environmental Justice Advisory Committee (NEJAC) tour of waste transfer stations in New York City. Both you and Congresswoman Nydia Velazquez participated in the event. In addition, you secured \$3.85 million in Special Appropriations, which EPA used to provide a series of grants between 1999 and 2009 to the NYU School of Medicine and NYU's Wagner Graduate School of Public Service. The funds were also used in the South Bronx for air monitoring studies, human exposure studies at schools, Geographic Information Systems mapping and community education and engagement.

As a result of EPA's involvement in the South Bronx and similar impacted communities, EPA published *"Waste Transfer Stations: A Manual for Decision-Making"* in 2002.²⁰ In publishing this document, EPA intended to help state and local decision makers understand best practices for waste transfer station siting and operation. In the years since the complaint was filed, changes made by New York

¹⁸ Administrative Complaint supplement letter from Congressman Serrano to Ann Goode, Director, OCR, EPA, page 4 (December 23, 1998).

¹⁹ *Id.*

²⁰ EPA's Office of Solid Waste, members of the Solid Waste Association of North America Focus Group and the NEJAC Waste Transfer Station Working Group reviewed and provided comments on this draft document.

City and the NYSDEC in planning, policy, regulatory and enforcement actions, as further discussed in this letter, have improved environmental conditions in the community in terms of waste transfer station impacts.

NYSDEC'S COMMISSIONER POLICY 29

On March 19, 2003, NYSDEC issued Commissioner Policy 29 (CP-29),²¹ which applies to C&D facilities. This policy provides guidance for incorporating environmental justice concerns into the NYSDEC's environmental permit review process and its application of the State Environmental Quality Review Act. The policy also incorporates environmental justice concerns into some aspects of the NYSDEC's enforcement program, grants program and public participation provisions.

For example, upon initial receipt of a solid waste permit application or application to increase the design capacity or tonnage allowed for management under an existing permit, NYSDEC conducts a preliminary screen to identify whether the proposed action is in or near a potential environmental justice area(s) and to determine whether potential adverse environmental impacts related to the proposed action are likely to affect a potential environmental justice area(s).²² This determination is made through the use of a geographic information system application that examines the potential adverse environmental impacts on any census block groups that have either low-income or minority communities, each of which is defined in CP-29.²³ Those permit applications which possibly may have impacts on potential environmental justice areas were subject to the procedural requirements contained in CP-29.²⁴ A common trait among those types of applications is the requirement for the development of an enhanced public outreach plan to engage the public in a dialogue on potential project impacts.²⁵

DSNY'S COMPREHENSIVE SOLID WASTE MANAGEMENT PLAN

In September 2006, DSNY submitted its Comprehensive Solid Waste Management Plan (SWMP) to NYSDEC.²⁶ According to DSNY, a key principle that guided the development of the SWMP was to "treat each borough fairly;" *i.e.*, that responsibility for the City's waste management system should be allocated equitably throughout the City, in each of the five boroughs.²⁷ The SWMP called for the establishment of four converted marine transfer stations (MTS) – two in Brooklyn, one in Queens, and one in Manhattan, as well as a truck-to-rail waste

²¹ <http://www.dec.ny.gov/regulations/36951.html>.

²² *Id.*

²³ *Id.*

²⁴ Letter with list of WTSs in Community Boards 1 and 2 in 1998 and 2013 from Kenneth B. Brezner, P.E., Regional Materials Management Engineer, NYSDEC, Region 2 to Vicki Simons, Acting Director, OCR, EPA (May 15, 2013).

²⁵ *Id.*

²⁶ Letter from Carl Johnson, Deputy Commissioner, NYDEC to Harry Szarpanski, P.E., Assistant Commissioner, DSNY (October 27, 2006).

²⁷ http://www1.nyc.gov/assets/dsny/downloads/pdf/about/laws/swmp_exec_summary.pdf.

transfer station in Staten Island - as key elements to support this principle. NYSDEC approved the SWMP on October 27, 2006.²⁸ With regard to implementation of the SWMP, DSNY entered into a 20-year contract with Waste Management, Inc. to deliver all Bronx refuse to the Harlem River Yards facility, where it will be transported for final disposal outside of the City via rail.²⁹

Moreover, the SWMP, which NYSDEC approved, states that DSNY will improve conditions at waste transfer stations, including those in the South Bronx, by taking actions identified in its SWMP, which include:

- Implement more stringent operation and maintenance requirements, such as restrictions on air emission from stationary equipment and non-road vehicles and installation of state-of-the-art odor control equipment at all putrescible transfer stations;
- Impose limitations on the siting of new solid waste transfer stations and the expansion of existing facilities;
- Address truck traffic by conducting a feasibility study of redirecting truck routes; and
- Redistribute/limit capacity in communities with greatest concentration of transfer stations.

II. FACTUAL FINDINGS

EPA gathered information from NYSDEC and DSNY regarding the Triboro Fibers facility and the A.J. Recycling facility, as well as information about overall changes that have affected WTSs in New York City in recent years.

A. ALLEGATION 1 - NYSDEC'S RENEWAL OF SOLID WASTE PERMITS FOR THE TRIBORO FIBERS FACILITY ON FEBRUARY 10, 1998, AND RENEWAL OF A PERMIT FOR THE A.J. RECYCLING FACILITY ON MAY 5, 1998, RESULTS IN A DISCRIMINATORY EFFECT ON AFRICAN AMERICANS AND HISPANICS.

Triboro Fibers Facility

The Triboro Fibers facility has not operated at the 770 Barry Street address since September 10, 2003.³⁰ NYSDEC provided OCR with the letter that described the closure certification for the Triboro Fibers facility, which was a facility leased by Triboro Fibers, Inc. to sort, recycle and ship newsprint and related paper recyclables.

An NYSDEC inspection of the Triboro Fibers facility took place prior to April 29, 2003, which verified that there was no waste or recyclable material visible outside

²⁸ *Id.*

²⁹ *Id.*

³⁰ Letter from Earth Tech Northeast, Inc. to Armand De Angelis, Division of Solid and Hazardous Materials, Region 2, NYSDEC (July 10, 2003).

the storage areas.³¹ This location is now occupied by a local food supplier, Casablanca Commissary, Inc.³² NYSDEC conducted a final inspection on September 8, 2003, in order to determine compliance with the closure requirements of 6 CRR-NY Part 360.³³

Triboro Fibers Inc. requested that an environmental engineering consultant company, Earth Tech Northeast, Inc., assist in completing the facility's closure certification. On June 3, 2003, Earth Tech Northeast, Inc. performed a closure certification inspection of the facility and found no evidence of any remaining recyclables.³⁴

Because the Triboro Fibers facility at the 770 Barry Street location is no longer operational, the allegation as to this facility is rendered moot. Accordingly, OCR is administratively closing the portion of the complaint against NYSDEC involving Triboro Fibers and will take no further action on it effective the date of this letter.

A.J. Recycling Facility

As noted previously, NYDEC regulated A.J. Recycling as a permitted facility because it processes C&D debris that is contaminated and/or commingled with other solid waste.

A.J. Recycling Facility's Permit

OCR's inquiry revealed that NYSDEC has made changes in its permit requirements for C&D debris processing facilities, such as A.J. Recycling. Specifically, NYSDEC requires that all processing, tipping, storage, compaction and related activity be conducted in an enclosed or covered area.³⁵ Moreover, the SWMP, which was approved by NYSDEC, states that DSNY will address the siting of C&D facilities and other waste facilities in the South Bronx community by meeting the stated goals of its SWMP, which include:

³¹ *Id.*

³² <http://www.nyc.gov/html/doh/downloads/pdf/cdp/licensed-commissaries-depots.pdf>.

³³ 6 NYCRR 360-1.14(w). The requirements under this regulation include the following: The owner or operator of any active or inactive solid waste management facility must, upon termination of use, properly close that facility and must monitor and maintain such closure so as to minimize the need for further maintenance or corrective actions and to prevent or remedy adverse environmental or health impacts such as, but not limited to, contravention of surface water and groundwater quality standards, gas migration, odors and vectors. Termination of use includes those situations where a facility has not received solid waste for more than one year, unless otherwise provided by permit, or if the permit has expired. Termination of use also results from permit denial or order of the commissioner or of a court. Specific closure measures which may also include corrective actions as specified in this Part are subject to approval by the department.

³⁴ Letter from Earth Tech Northeast, Inc. to Armand De Angelis, Division of Solid and Hazardous Materials, Region 2, NYSDEC. (July 10, 2003).

³⁵ 6 NYCRR 360-11.4

- Expansion of barge and rail export of commercial waste;
- Redistribution of commercial waste flow;
- Minimizing truck trips associated with disposal of Manhattan's commercial waste; and
- Limiting siting of new facilities in communities with the greatest concentration of transfer stations.³⁶

OCR also learned that facilities possessing a Part 360 permit, including the A.J. Recycling facility, must operate with special permit conditions.³⁷ These special conditions, which were present in the A.J. Recycling facility's 2011 permit, include, but are not limited to the following:

Except as provided in subparagraph (b) of this Special Condition, any proposed change, including but not limited to one that would (i) affect the hours of facility operation; or (ii) increase the volume(s) or vary the type(s) of any waste accepted at the facility; or (iii) increase the parking or queuing of vehicles associated with the subject facility; or (iv) increase the physical extent of the facility; or (v) increase the transportation, noise, odor, dust, or other impact of the facility, requires prior written authorization from the Department in the form of a permit or permit modification. No such change is to be initiated unless and until first obtaining such permit or permit modification.³⁸

There must be no on-street truck queuing in association with the operation of the subject facility.³⁹

Before changing the time that a facility processing or storage area would be periodically cleared of material, as specified in Section 4.16 of the Engineering Report cited in Special Condition 16, above, the Permittee must request such change in writing and receive the Department's written authorization for such change.⁴⁰

DSNY has renewed the facility's permit annually since 2003.⁴¹ To obtain renewal, the facility must remain in compliance with DSNY's operating rules and with the applicable regulations of the NYSDEC.⁴² Renewal requires payment of a fee and

³⁶ http://www1.nyc.gov/assets/dsny/downloads/pdf/about/laws/swmp_exec_summary.pdf.

³⁷ The New York State SWMP administers Part 360 permits, registrations, variances and other permit-related determinations regarding the construction and operation of solid waste management facilities. See *also* <http://www.dec.ny.gov/chemical/8498.html>.

³⁸ A.J. Recycling Inc., DEC Permit No. 2-6007-00137/00001 page 3 17. a (June 29, 2011).

³⁹ *Id.* at 4. 24.

⁴⁰ *Id.* at 4. 27.

⁴¹ Letter from Steven N. Brautigam, Assistant Commissioner, DSNY to Vicki Simons, Acting Director, OCR, EPA at page 2. (July 10, 2013).

⁴² *Id.*

submission of an annual report by a certified engineer that the facility complies with applicable manufacturing district performance standards of NYC's Zoning Resolution, which relate to noise, particulate matter, odor and enclosure.⁴³

As required by New York Code of Regulations, the A.J. Recycling facility is listed in New York City's SWMP as one of the private facilities upon which the City/planning unit relies to process commercial sector solid waste, including waste from residential construction and renovation projects.⁴⁴ Pursuant to DSNY's authority under the City Charter and Administrative Code, DSNY's regulation involves regular inspections (3-4 full inspections, plus several drive-by inspections per month).⁴⁵ DSNY issued a permit modification in 2003 to allow A.J. Recycling to expand the area of its facility by adding lots 340 and 342, which did not involve any increase in storage or throughput volume or additional processing equipment.⁴⁶ An environmental review was conducted for the facility and a Negative Declaration was issued in support of the finding that the expansion would not result in a significant adverse environmental impact.⁴⁷

The A.J. Recycling facility was granted a permit renewal on May 5, 1998, through May 2003, which outlined a number of changes, including the authorization to install a sand interceptor and detention tank in a vacant lot.⁴⁸ As listed below, additional permit modifications include both operational changes and site reconfigurations:

- On December 1, 2004, a monitor account was added. (This resulted in an increase in NYSDEC inspections at the facility).⁴⁹
- On March 12, 2007, the facility added a misting system (misting system increases dust control).⁵⁰
- On June 29, 2011, the facility added a picking station, scale, and another lot across the street. (The picking station increases recycling, the scale addresses the Department of Transportation's road weight restrictions and the additional lot accommodates truck queuing).⁵¹

⁴³ *Id.*

⁴⁴ *Id.* at 1-2.

⁴⁵ Letter from Steven N. Brautigam, Assistant Commissioner, DSNY to Vicki Simons, Acting Director, OCR at page 2, EPA. (July 10, 2013). *Id.* at 1.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Permit renewal letter from John J. Ferguson, Regional Permit Administrator, NYSDEC, Division of Environmental Permits, Region 2 Office to Paul D. Casowitz, Sive, Paget & Riesel. (May 5, 1998).

⁴⁹ Email from Kenneth B. Brezner, P.E., Regional Materials Management Engineer, Region 2, Division of Materials Management, NYSDEC to George Pavlou, Deputy Regional Administrator, Region 2, EPA. (November 25, 2011).

⁵⁰ *Id.*

⁵¹ *Id.*

In 2009, DSNY reviewed an application to reconfigure the facility and authorized the following:

- Add three lots across from the Faile Street address, to provide truck staging, truck scales and waste truck queuing as part of facility operations. This would improve the facility operations, and reduce the queuing of trucks on local streets;⁵²
- Replace a diesel-powered screener with an electrical power screener which will produce lower emissions. No increase in daily throughput volume was requested. An environmental review of this proposed permit modification, including a review of air quality impacts conducted by the City's air quality staff of the Department of Environmental Protection, found that it would not result in significant adverse environmental impacts.⁵³

Lastly, OCR's review of records for the A.J. Recycling facility included inspection reports dating back to the mid-1990s to FY 2015, which show that there have been no significant operating violations.

A.J. Recycling Facility's Effect on Air Quality

The complaint expressed concerns regarding the effect of facility operations on air quality and health in the South Bronx. To assess the air quality effects of the AJ Recycling facility operations, EPA reviewed a detailed air quality analysis performed by the facility's consultant for the permit modifications proposed in 2009-2010.

Specifically, OCR reviewed A.J. Recycling's Air Quality Analysis reports, dated September 14, 2009, and October 15, 2010 prepared by Galli Engineering, P.C. and Sandstone Environmental Associates, Inc. Both documents were developed to satisfy New York City's Environmental Quality Review (CEQR) obligations as outlined in the CEQR Technical Manual.

The CEQR is New York City's "process for implementing the State of New York's Environmental Quality Review Act (SEQRA), by which agencies of the City of New York review proposed discretionary actions to identify and disclose the potential effects those actions may have on the environment."⁵⁴ Furthermore, "SEQRA permits a local government to promulgate its own procedures, provided they are no less protective of the environment, public participation, and judicial review than provided for by the state rules."⁵⁵

⁵² Letter from Steven N. Brautigam, Assistant Commissioner, DSNY to Vicki Simons, Acting Director, OCR, EPA at page 4. (July 10, 2013).

⁵³ *Id.*

⁵⁴ City Environmental Quality Review Technical Manual, Revised May 2010, p. 1-1.

⁵⁵ *Id.*

The CEQR Technical Manual defines the criteria for proposed action conditions which mandate air quality evaluations.⁵⁶ The CEQR Technical Manual was adopted in 1991 and subsequently revised in 2001, 2010, 2012, and 2014. As part of the OCR inquiry, OCR did not review each of the CEQR Technical Manuals or the associated guidance documents to determine the operational compliance with the local requirements or re-run the air quality models to identify and confirm the accuracy of the results. Each of the air models was used in general accordance with the specifications outlined in the respective technical manual that was in effect at the time of the performance.

As highlighted in Table 1 below, A.J. Recycling's proposed modifications satisfied two (2) of the proposed action conditions that resulted in the performance of air quality evaluations for the site.

Table 1⁵⁷
CEQR Criteria for Scope of Work

Criteria	Proposed Action Conditions	Analysis Required
Actions generating 100 or more peak-hour auto trips	The maximum number of additional vehicular trips in an hour would be 10.	No
Actions resulting in a substantial number of diesel vehicle trips	Based on NYCDEP's current screening procedures, the threshold volume of truck trips would be total emissions equivalent to 2008 PM _{2.5} emissions from 12, 19, or 23 Heavy Duty Diesel Vehicles, depending on the roadway type. This is higher than the maximum hourly increment of 10 truck trips.	No
Actions using fossil fuels for HVAC systems	No fossil fuel would be used for HVAC.	No
Actions resulting in sensitive uses within 400 feet of a manufacturing or processing facility	No sensitive uses are within 400 feet of the locations of the existing or proposed areas of operations.	No
Actions resulting in any significant odors	The facility would not generate odors.	No
Actions that would include operation of manufacturing or processing facilities	The facility would generate combustion pollutants from equipment used to process the waste.	Yes

⁵⁶ *Id.*

⁵⁷ Galli Engineering, P.C and Sandstone Environmental Associates, Inc.; *AIR QUALITY ANALYSIS, A.J. RECYCLING, INC., 325 Faile Street Bronx, NY 10474*; September 14, 2009, p.3.

Actions that would create non-point sources such as particles from unpaved surfaces and storage piles (fugitive dust)	Non-point sources include fuel combustion and fugitive dust emissions from trucks and equipment on the site, as well as fugitive dust emissions from materials handling such as tipping, loading, and transfer of materials.	Yes
-----------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----

Although no state permits were required for the proposed actions, the total emissions were calculated to determine the potential to emit (PTE)⁵⁸ and contrasted to the state and federal significant *de minimis* criteria to demonstrate conformance with the State Implementation Plan (SIP). As a result, both documents were subsequently submitted to the NYSDEC as part of the facility's engineering records.

The scope of the air quality analysis evaluated existing and background concentrations for carbon monoxides (CO), nitrogen dioxide (NO₂), sulfur dioxide (SO₂), inhalable particulate matter (PM₁₀, and PM_{2.5}); calculated air emissions from on-site vehicles and equipment for volatile organic compounds (VOC), CO, SO₂, NO₂, and PM (10 and 2.5); and modelled air emissions from on-site sources utilizing AMS/EPA Regulatory Model (AERMOD). The modelled air concentrations were compared to the National Ambient Air Quality Standards (NAAQS), as appropriate.

The 2009 and 2010 air quality analyses evaluated potential air impacts from a 'No Action' versus 'Action' scenario associated with A.J. Recycling's proposed physical re-configuration and operational alterations, which were identified as follows:

- Installation of a new picking station in the processing yard;
- An increase in the on-site storage capacity from 800 cubic yards to 1400 cubic yards;
- The addition of three property lots to contain one 2-story building, scales, and relocated queuing area;
- The replacement of a diesel screener with an electric picking line;
- The construction of a concrete pad for the picking station; and
- Rearrangement of on-site storage on existing lots.

The A.J. Recycling facility's current and proposed operational and physical location changes generated pollutants from equipment that processed the wastestream, and non-point sources of fuel combustion from equipment and materials handling.⁵⁹ No analysis of pollutant concentrations from off-site truck traffic was included as part of the evaluation, since the maximum hourly number of truck trips (26 truck trips per hour) fell below the screening thresholds for CO and PM_{2.5}. Similarly, due to the non-putrescible nature of the wastestream, C&D debris, no analysis of odors was completed.

⁵⁸ 6 NYCRR Part 201.

⁵⁹ From Table 1 above: Non-point sources include fuel combustion and fugitive dust emissions from trucks and equipment on the site, as well as fugitive dust emissions from materials handling such as tipping, loading, and transfer of materials.

The 2009 and 2010 air modelling reports were developed independently and in accordance with applicable state and local requirements at the time of the evaluations. The October 2010 air modelling report was performed in general accordance with New York City's technical requirements and guidance documents and appears to be generally consistent with EPA's modelling guidelines. Due to the replacement of the diesel-powered screener with an electric picking station, the emissions under the proposed 'Action' scenario were lower than the emissions under the 'No Action' scenario. **See Table 2 below.** On-site equipment contributed to the majority of the pollutant emissions of CO, SO₂, and nitrogen oxides (NO_x). These results additionally stated that the material handling process (e.g., storage piles) contributed to the PM₁₀ and PM_{2.5} emissions.

Table 2⁶⁰
No Action v. Action Scenarios

	<u>No Action</u>	<u>Action</u>	<u>Difference</u>
Carbon Monoxide			
On-site trucks	0.13	0.15	0.02
On-site equipment	1.40	1.23	-0.17
Piles	0.00	0.00	0.00
<i>Total</i>	1.53	1.38	-0.15
Volatile Organic Compounds			
On-site trucks	0.02	0.02	0.00
On-site equipment	0.54	0.51	-0.04
Piles	0.00	0.00	0.00
<i>Total</i>	0.57	0.53	-0.04
Sulfur Dioxide			
On-site trucks	0.00	0.00	0.00
On-site equipment	1.86	1.77	-0.09
Piles	0.00	0.00	0.00
<i>Total</i>	1.86	1.77	-0.09
Nitrogen Oxides			
On-site trucks	0.17	0.20	0.03
On-site equipment	8.00	7.60	-0.40
Piles	0.00	0.00	0.00
<i>Total</i>	8.17	7.80	-0.37
PM₁₀			
On-site trucks	0.02	0.06	0.04
On-site equipment	2.73	2.65	-0.08
Piles	3.18	3.06	-0.12
<i>Total</i>	5.93	5.77	-0.16

⁶⁰ The units in Table 2 are tons/year. The No Action and Action Scenarios represent A.J. Recycling's operations before and after the proposed physical re-configuration and operational alterations, respectively. The difference in emissions between these two scenarios is shown in the last column. Note that all numbers are rounded to two decimal points.

PM2.5			
On-site trucks	0.00	0.00	0.00
On-site equipment	0.44	0.36	-0.08
Piles	0.47	0.46	-0.01
<i>Total</i>	0.91	0.82	-0.09

Based on the October 2010 air quality assessment report, the 'Action' scenario is projected to result in lower air concentrations than the (current) 'No Action' scenario for all pollutants (*i.e.*, there will be an improvement in air quality). **See Table 3 below.** For those NAAQS pollutants for which the area is designated attainment (**see Regional Air Quality Status section below**), a total (cumulative) concentration estimate was made to ensure continued attainment of those NAAQS. Background concentrations were documented based primarily on monitoring data obtained from the IS52 air quality monitoring station located in the Bronx, New York, and the NYCDEP referenced guidance. (For those NAAQS pollutants for which the area is designated nonattainment (**see Regional Air Quality Status section below**)), no total concentration estimate was appropriate; *i.e.*, the only necessary criteria were for the project to ensure a net improvement in air quality.) **As seen in Table 3 below**, the predicted 'Action' impacts in combination with existing (background) air quality levels is below the applicable standard for all NAAQS attainment air pollutants.⁶¹ In addition, the predicted 'Action' impacts reflect lower levels compared to the (current) 'No Action' impacts for the NAAQS nonattainment air pollutants.

Table 3⁶²
Action and No Action Impacts with
Background (Existing) Air Quality Levels

Pollutant	Averaging Period	Standard	Back-ground Value	Maximum Modeled Value		Total		Difference (Action - No Action)
				No Action	Action	No Action	Action	
NAAQS Nonattainment Pollutants								
PM2.5	24-hr.	35	--	18	9	--	--	-9
	Annual	15	--	2	1	--	--	-1

⁶¹ In 2010, EPA adopted new, 1-hour standards for SO₂ and NO₂. The final rulemaking for the 1-hour SO₂ standard of 75 ppb (196 ug/m³) was published in the Federal Register on June 22, 2010 (effective date of standard was August 23, 2010). The final rulemaking for the 1-hour NO₂ standard of 100 ppb (189 ug/m³) was published in the Federal Register on February 9, 2010 (effective date of standard was April 12, 2010). In 2012, EPA adopted a new annual standard for PM_{2.5}. The final rulemaking for this annual PM_{2.5} standard of 12 ug/m³ was published in the Federal Register on January 15, 2013 (effective date of standard was March 18, 2013). Because the September 14, 2009 initial air quality modelling report preceded these standards, no information is available for this report regarding compliance with them.

⁶² The units in Table 3 are ug/m³ – micrograms per cubic meters.

NAAQS Attainment Pollutants								
PM10	24-hr.	150	60	66	61	126	121	-5
CO	1-hr.	10,000	3,550	1,483	475	5,033	4,025	-1,008
	8-hr.	40,000	2,290	354	192	2,644	2,482	-162
SO2	3-hr.	1,300	228	575	391	803	619	-184
	24-hr.	365	123	243	172	686	295	-71
	Annual	80	29	5	4	34	33	-1
NOx	Annual	100	56	21	16	77	72	-5

In light of the air quality demonstration that was documented through the performance of the air quality models, as well as an examination of site-specific information, there is insufficient evidence to show that the proposed emissions from the A.J. Recycling facility cause or contribute to unhealthy air quality levels. Furthermore, there is insufficient evidence to demonstrate that the proposed emissions from the A.J. Recycling facility cause or contribute to degradation in local air quality. Therefore, there is also insufficient evidence to conclude that any emissions from the A.J. Recycling facility's proposed modifications would contribute to air quality impacts in a discriminatory manner on the basis of race, color, or national origin.

Regional Air Quality Status

During the performance of the 2009 and 2010 air quality assessments for A.J. Recycling, the facility was located in a regional area that was classified by EPA as moderate non-attainment for the 1997 8-hour ozone standard and non-attainment for the 1997 annual PM_{2.5} standard. (On November 13, 2009, the regional area was also designated non-attainment for the 2006 24-hour PM_{2.5} standard.) Under the Clean Air Act (CAA), the State of New York is one of the northeastern states located within the EPA's designated Ozone Transport Region (OTR). States located within the OTR are required to develop state implementation plans (SIPs) and implement control measures for pollutants that form ozone. In addition, during this period, the regional area was classified as attaining the NAAQS for NO₂, SO₂, CO, and lead.

As part of the regional air quality review, OCR confirmed the current regional air quality status with EPA's Region 2 office. At this time, the Bronx is still designated moderate non-attainment for the 1997 8-hour ozone standard. (Note, on May 21, 2012, the area was also designated marginal non-attainment for the 2008 8-hour ozone standard.) For PM_{2.5}, however, the Bronx is part of an area that the EPA has redesignated to attainment of the PM_{2.5} NAAQS. This redesignation was published in the Federal Register on April 18, 2014, at 79 FR 21857 and was primarily based on air quality data from the 2010 – 2012 period which show PM_{2.5} concentrations are meeting the Standard. In fact, ambient air quality data recorded in the area since the 2007 – 2009 time period have been meeting the PM_{2.5} standards. Along with the redesignation request, New York State provided a "maintenance" plan, which demonstrates how the area will continue to meet the standard. The plan also contains provisions for additional

emission reductions in the unlikely event the area violates the PM_{2.5} standard in the future.

B. ALLEGATION 2 - DSNY'S RENEWAL OF PERMITS FOR WTSS IN THE SOUTH BRONX CONTRIBUTE TO THE CLUSTERING OF WTSS AND DISPROPORTIONATE ENVIRONMENTAL AND PUBLIC HEALTH BURDENS IN TWO PREDOMINATELY MINORITY COMMUNITY DISTRICTS WHILE BENEFITING NEW YORK CITY'S PREDOMINANTLY WHITE COMMUNITY DISTRICTS.⁶³

As previously stated, while OCR initially accepted the allegations against DSNY, they were not extensively investigated because DSNY ceased to be a recipient in 2000. However, OCR requested and received additional information regarding DSNY's current permitting and regulatory practices as well as some additional information from DSNY concerning WTSS in Community Boards 1 and 2.

Additional Information Regarding DSNY WTS Siting and Operational Requirements

DSNY's revised rules for the siting of new transfer stations are progressively more stringent for areas of the City where there are currently relatively higher numbers of transfer stations.⁶⁴ In particular, for the Bronx's Community Board 2 in which A.J. Recycling is located and which has a relatively high proportion of both industrial land and transfer stations, the rules prohibit an increase in new transfer stations' daily throughput capacity unless existing capacity is reduced elsewhere in the district by the same amount; prohibit new transfer stations in light manufacturing M1 zones; and require that any new transfer station be at least 600 feet from a residence district, park, school, or hospital, and at least 400 feet from another transfer station.⁶⁵

In May 2004, DSNY promulgated final rules that imposed stricter operational requirements regarding transfer stations, including those in Community Boards 1 and 2. These operational requirements include odor control equipment, negative air pressure, and dust control measures, which affected four putrescible WTSS, five Mixed C&D facilities, including A.J. Recycling, and five Fill Material Transfer Stations located in Community Boards 1 & 2. In April 2005, DSNY promulgated final rules governing the siting of transfer stations. The siting rules apply to new facilities, while the prohibition on additional throughput capacity applies to existing facilities. Under the new rules, DSNY does not entertain applications for new transfer station facilities in certain areas of the City, including in Bronx Community Board 2. The number of transfer stations in New York City and in the Bronx's Community Boards 1 and 2 has declined considerably since 1998. A.J. Recycling is in an M3 district

⁶³ Acceptance of Complaint letter from Anne Goode, Director, OCR, EPA to Commissioner Kevin Farrell, Commissioner, DSNY. (October 25, 1999).

⁶⁴ Letter from Steven N. Brautigam, Assistant Commissioner, DSNY to Vicki Simons, Acting Director, OCR, EPA at page 3. (July 10, 2013).

⁶⁵ *Id.*

where residential uses are prohibited, so there is no residential community immediately surrounding the A.J. Recycling facility. According to DSNY, the siting and operating rules have reduced transfer station impacts on the surrounding areas.⁶⁶

DSNY amended its rules to establish more stringent operation and maintenance requirements for existing and new transfer stations in 2005. These changes included:

- New requirements for tire-cleaning procedures and site paving to address the problem of tracking dirt onto public roadways from the facility.⁶⁷
- Facilities must install state-of-the art ventilation equipment to improve the air exchange rate at putrescible transfer stations and help the escape of odors. All putrescible transfer stations must install odor control equipment to neutralize odors rather than simply mask them with another scent.⁶⁸
- Facility owners are required to keep their drains clean and unclogged to prevent leachate or wastewater runoff onto public roadways and minimize the build-up of odor-causing residue.⁶⁹

Alternatives to Waste Transfer Stations

DSNY has entered into a long-term contract for the disposal of DSNY managed Municipal Solid Waste (MSW) from the Bronx via the Waste Management Harlem River Yard transfer station, which transports waste by rail to a landfill in Virginia. This contract has eliminated the use of long-haul transfer trailers for DSNY managed MSW from the Bronx, notably in Community Boards 1 and 2.⁷⁰

According to DSNY, the SWMP has led to improvements in the environmental conditions within Community Boards 1 and 2. For example, with the completion of DSNY's Marine Transfer Station on the North Shore of Queens, deliveries of municipal solid waste from Queens are put it into containers for barge transport to an intermodal rail facility in New Jersey or Staten Island.⁷¹ This shift to barge and rail transport eliminates hundreds of truckloads per week of municipal solid waste that currently depart from Queens and traverse the Bronx *en route* to transfer and/or disposal facilities in New Jersey and New York State.⁷²

As previously noted, DSNY has contracted to construct a marine transfer station in the East River at East 91st Street in Manhattan.⁷³ When operational, the facility will

⁶⁶ See *id.* at 4-5.

⁶⁷ See *id.* at 3.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *id.* at 4.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

be able to accept commercial putrescible waste at night.⁷⁴ As Manhattan has no commercial waste transfer stations, DSNY anticipates that some of this commercial putrescible waste is currently going to facilities in Bronx Community Boards 1 and 2, and therefore the diversion of such waste to this proposed DSNY facility is expected to reduce commercial waste truck deliveries from Manhattan to putrescible waste transfer stations in these districts.⁷⁵

DSNY has implemented Best Available Retrofit Technology (BART) to its entire fleet of diesel waste and recycling collection trucks, pursuant to Local Law 39 of 2005, which has benefited the local environment near transfer stations used by DSNY, including the Harlem River Yard facility in Bronx Community Board 1.⁷⁶ Further, DSNY states that the use of ultra-low sulfur diesel, which DSNY pioneered, has resulted in a reduction in particulate matter emissions of 90% below 2006 model year levels, and 98% below the levels of old, unregulated diesel trucks, to levels comparable to emissions from compressed natural gas vehicles.⁷⁷

Moreover, DSNY's vendor for waste and recycling collection trucks, (Waste Management), has complied with Local Law 40 of 2005, which requires that non-road diesel equipment used primarily in the City to implement a solid waste disposal or recycling contract for the City of New York be retrofitted with BART.⁷⁸ According to DSNY, this has resulted in additional particulate matter emissions reductions in Bronx District 2.⁷⁹ As a result of these and other measures, DSNY asserts that the level of fine particulate matter, or PM_{2.5}, has declined in the Bronx and in the rest of New York City to levels that now meet the NAAQS for this pollutant.⁸⁰

Letter of Agreement

In addition, OCR notes that on September 30, 2011, EPA Region 2 entered into a Letter of Agreement (LOA)⁸¹ with NYSDEC to share information about the NYSDEC's oversight of WTSs in the South Bronx, with particular attention to WTSs in Community Boards 1 and 2. The LOA is a mutual agreement intended to provide assurances to the residents of the South Bronx that there is appropriate oversight of the WTS, including recycling and C&D facilities, in their community, and that NYSDEC will provide pertinent information in this regard to EPA on a semi-annual basis. The LOA ended in July 2014 and included language that it may be extended if desired, by mutual agreement of the parties.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ LOA signed by Joseph Martens, Commissioner, and Steven C. Russo, Deputy Commissioner and General Counsel, NYSDEC and Judith Enck, U.S. EPA Region 2 Administrator, and Eric Schaaf, Regional Counsel of the U.S. EPA Region 2 (October 3, 2011).

III. CONCLUSION

As stated above, while OCR initially accepted the permit renewal process resulting in clustering of WTSs that have a disparate impact allegation against DSNY, that allegation was no longer the focus of OCR's inquiry after 2000 when DSNY ceased to be a recipient. In addition, the allegation concerning the Triboro Fibers facility at the 770 Barry Street location is now moot because this facility is no longer operational. As previously discussed in this letter, OCR has determined that it is closing the inquiry into the remaining allegations against the NYSDEC permitting of the A.J. Recycling facility as there is insufficient evidence to conclude that any emissions from the A.J. Recycling facility's proposed modifications would contribute to air quality impacts in a discriminatory manner on the basis of race, color, or national origin. This determination is not intended and should not be construed to cover any other issues that may exist and are not specifically addressed in this Letter.

Although EPA is closing the subject administrative complaint with no determination of discrimination in violation of Title VI of the Civil Rights Act of 1964, as specified above, the Agency is committed to protecting the health and environment of all communities, including the South Bronx. OCR is willing to provide technical assistance regarding compliance with federal non-discrimination obligations to any applicant for, or recipient of, federal financial assistance. Accordingly, OCR will be in contact with NYSDEC to discuss potential technical assistance opportunities.

Please note that the complainant, Congressman Serrano, may file a new complaint if he or his constituents acquire evidence that DSNY has resumed receipt of EPA federal financial assistance and future noncompliance concerns are identified. If you have any questions, we encourage you to contact the EPA offices in Region 2 to discuss this matter. Alternatively, if you have any questions about the civil rights matter, please contact Brittany Martinez, Case Manager, OCR External Compliance and Complaints Program, at (202) 564-0727.

Sincerely,



Velveta Golightly-Howell
Director

cc: Catherine McCabe, Deputy Regional Administrator
Rich Manna, Deputy Civil Rights Official
EPA Region 2

Elise Packard, Associate General Counsel
EPA Civil Rights and Finance Law Office (2399A)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

April 22, 2016

OFFICE OF
CIVIL RIGHTS

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In Reply Refer to:

EPA OCR File No.: 10R-98-R2

Basil Seggos, Acting Commissioner
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1011

Kathryn Garcia, Commissioner
New York City Department of Sanitation
Central Correspondence Unit
346 Broadway, 10th Floor
New York, New York 10013

Re: Letter of Closure of Administrative Complaint

Dear Commissioners Seggos and Garcia:

This letter concerns the administrative complaint submitted to the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) by United States Congressman José E. Serrano on behalf of his constituents in the South Bronx area of New York City, dated May 26, 1998, supplemented on December 23, 1998, and on May 16, 1999. The complaint alleges violations of Title VI of the Civil Rights Act of 1964 (Title VI) as amended, 42 United States Code (U.S.C.) §§ 2000d to 2000d-7, and EPA's implementing regulations found at 42 U.S.C. Part 7, by the New York State Department of Environmental Conservation (NYSDEC)¹ and the New York City Department of Sanitation (DSNY).² This letter addresses the following allegations, which were accepted by OCR against the NYSDCE and DSNY on March 11, 1999, and October 25, 1999, respectively:³

Allegation 1 - NYSDCE's renewal of solid waste permits for the Triboro Fibers facility on February 10, 1998, and renewal of a permit for the A.J.

¹ NYSDCE receives federal funds from EPA.

² Formerly referred to as NYCDOS.

³ Acceptance of Complaint letter from Anne Goode, Director, OCR, EPA to Complainants, NYSDCE (March 11, 1999). See also Acceptance of Complaint letter from Anne Goode, Director, OCR, EPA to Commissioner Kevin Farrell, DSNY (October 25, 1999).

Recycling facility on May 5, 1998,⁴ results in a discriminatory effect on African Americans and Hispanics.⁵

Allegation 2 - DSNY's renewal of permits for waste transfer stations (WTSs) in the South Bronx contributes to the clustering of WTSs and disproportionate environmental and public health burdens in two predominantly minority community districts while benefiting New York City's predominantly white community districts.⁶

As explained more fully below, OCR is closing this matter against NYSDEC as it relates to the Triboro Fibers facility because the facility located at the 770 Barry Street address location is no longer operational.

OCR is also closing the inquiry into the allegation against NYSDEC as it relates to the permitting of the A.J. Recycling facility based on a number of considerations including: reports submitted to NYSDEC reflecting the facility's reduced contribution to the degradation of regional air quality; special permit conditions and operational changes that have occurred at the facility; and improvements to the general waste management operations. Collectively, these factors show changes in the overall circumstances since the complaint was filed.

Ultimately, there is insufficient evidence to show that the proposed emissions from the A.J. Recycling facility cause or contribute to unhealthy air quality levels or cause or contribute to degradation in local air quality. Accordingly, there is also insufficient evidence to conclude that any emissions from the A.J. Recycling facility's proposed modifications would contribute to air quality impacts in a discriminatory manner on the basis of race, color, or national origin.

In addition, OCR is closing its inquiry into the allegation relating to DSNY because it has not been a recipient of EPA federal financial assistance since December 31, 2000.⁷

I. BACKGROUND

Complainants in this matter are a group identified as "Concerned Citizens." In a letter dated May 26, 1998, Concerned Citizens submitted a Title VI complaint which alleged that the residents living in the South Bronx communities were experiencing

⁴ The original accepted allegation incorrectly identified both facilities as receiving solid waste permit renewals. The A.J. Recycling facility did receive a solid waste permit, but Triboro Fibers was a recyclables handling and recovery facility (RHRF). RHRFs are required to be registered with (rather than permitted by) the NYSDEC. The original allegation did not explain this distinction.

⁵ See footnote 3 above.

⁶ See footnote 3 above.

⁷ According to U.S. EPA's Integrated Grant Management System Database, EPA Region 2 provided a grant to DSNY on September 29, 2000. The project ended on December 31, 2000. Notwithstanding this change in recipient status, this letter will include information about the allegations related to DSNY.

discriminatory environmental and public health burdens due to the number of waste transfer stations located in their communities.⁸ Congressman Serrano, who represents the 15th Congressional District of New York in the Bronx, subsequently provided OCR with supplemental information on behalf of his constituents.⁹

NYSDEC is a recipient of EPA financial assistance. It is empowered to conserve, improve and protect New York state's natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being.

NYSDEC regulates construction and demolition (C&D) debris processing facilities through permitting or registration.¹⁰ Facilities processing uncontaminated C&D debris are registered, and facilities processing C&D debris that is contaminated and/or commingled with other solid waste are permitted. NYSDEC regulates recyclables handling and recovery facilities (RHRFs) solely through registration. NYSDEC also issues permits statewide to WTSs that receive 12,500 tons (50,000 cubic yards) or more of household waste per year, and registers WTSs that receive less than this amount per year.

NYSDEC regulates the A.J. Recycling facility as a permitted C&D debris processing facility. A.J. Recycling facility is located within an area zoned predominantly for manufacturing purposes (M-1 and M-3). According to zoning records, A.J. Recycling is surrounded by an industrial district for at least a quarter of a mile. NYSDEC also regulated the Triboro Fibers facility as a registered RHRF.

As stated above, DSNY has not been a recipient of EPA federal financial assistance since December 31, 2000. However, it is responsible for managing New York City's solid waste, which includes garbage and recycling collection, street cleaning, and snow removal. Title 16, Chapter 4 of the Rules of the City of New York identifies the rules and regulations promulgated by DSNY applicable to transfer stations, including but not limited to C&D debris transfer stations, such as A.J. Recycling. DSNY has promulgated general and specific regulations applicable to non-putrescible solid WTSs, C&D debris transfer stations and fill material transfer stations, putrescible solid waste transfer stations, and intermodal solid waste container facilities (facilities served by rail or vessel transporting containerized solid waste).

COMPLAINANT'S ALLEGATIONS AND SUPPORTING INFORMATION

The Concerned Citizens complaint named both DSNY and NYSDEC as respondents because they issued construction and operation permits to the facilities.

⁸ Letter from Concerned Citizens to Jeanne M. Fox, EPA Regional Administrator, Region 2 (May 26, 1998).

⁹ This information is discussed further below.

¹⁰ New York State regulations pertaining to solid waste management facilities, including WTSs, C&D debris processing facilities, and RHRFs, are found in the New York Code of Rules and Regulations Part 360.

Specifically, the complaint states that NYSDEC issued a renewal for the Triboro Fibers facility and a permit for the A.J. Recycling facility within 180 calendar days prior to the filing of the Title VI complaint.¹¹ In Congressman Serrano's December 23, 1998 letter, he alleged that permitting actions by DSNY and NYSDEC were specific discriminatory acts that occurred within 180 calendar days prior to the May 29, 1998 complaint filing.¹²

The complaint asserts that there were over sixty waste facilities in Community Boards 1 and 2,¹³ including approximately thirty-five WTSs, several sewage treatment plants, a major bio-solids processing facility, numerous automotive yards, and metal finishing shops.¹⁴ Additionally, the complaint states that the area has more land zoned for M-3 usage (land reserved by the city for the most noxious uses) than any other area in the city.¹⁵

The complaint further states that based on the 1990 U.S. Census, the district has a total population of 581,053, of whom 342,897 (59.0%) are Hispanic and 199,808 (34.4%) are African American. The complaint also states that these minority groups make up 95% of the Congressional District and that Community Board 1 has a total population of 77,214, of whom 51,627 (66.9%) are Hispanic and 23,356 (30.5%) are African American. According to the complaint, Community Board 2 has a total population of 39,443, of whom 31,115 (78.9%) are Hispanic and 7,463 (9.7%)¹⁶ are African American.

Finally, the complaint outlines the alleged health impacts experienced by the residents of the South Bronx, which include increases in:

- asthma rates;
- respiratory diseases;
- pneumonia;
- influenza; and
- skin/breast cancer.¹⁷

¹¹ Letter from Congressman Jose E. Serrano *et al.* to Anne Goode, Director, OCR, EPA (December 23, 1998). During the course of its investigation, OCR learned that the Triboro Fibers facility, which is a RHRF, was only registered with the state and was not permitted.

¹² Letter from Concerned Citizens to Jeanne M. Fox, EPA Regional Administrator, Region 2 (May 26, 1998).

¹³ Community Boards 1 and 2 occupy the south-southwest tip of the Bronx, along the East River from the outlet of the Hudson River to the outlet of the Bronx River. They include the Port Morris, Mott Haven, Melrose, and Hunts Point neighborhoods.

¹⁴ Letter from Congressman Serrano to Anne Goode, Director, OCR, EPA (December 23, 1998).

¹⁵ Letter from Concerned Citizens to Jeanne M. Fox, EPA Regional Administrator, Region 2 (May 26, 1998).

¹⁶ According to the 1990 Census data, the percentage for African Americans in Community Board 2 was 19%.

¹⁷ Administrative Complaint supplement letter from Congressman Serrano to Ann Goode, Director, OCR, EPA, page 4. (December 23, 1998).

The complaint cites statistics compiled in various studies conducted in the 1980s and 1990s by the New York State Department of Health (NYSDOH), the United Hospital Fund, and the Mount Sinai Medical Center, which describe the Hunts Point and Mott Haven communities as suffering the highest hospitalization rates for asthma in New York, as well as the United States.¹⁸

In addition, the complaint cites to: "1) a 1993 study depicting the asthma hospitalization rate for children ages 0-17 years old in these communities was over 18 per 1,000 on average, more than three times the national rate for this age group, and over twice the city rate; and 2) a 1998 health study conducted by the Hunts Point Childhood Health Promotion Initiative and the NYSDOH that included the responses of over 2,500 children attending three public schools in Hunts Point, which found that over 21% of the children surveyed have asthma."¹⁹

EPA'S ACTIONS BETWEEN 1998 – 2009

When the waste transfer station issues were brought to EPA's attention, the community alleged it was suffering from air quality, traffic, litter, noise and other impacts resulting from the proliferation of waste transfer stations in the South Bronx. Moreover, with the prospect of closing Staten Island's Fresh Kills landfill (the nation's largest at the time), the affected community was apprehensive about the Fresh Kills landfill closure exacerbating the conditions for the South Bronx. EPA worked with the community on an ongoing basis to provide technical assistance on waste management and air quality. For example, EPA Region 2 served in an ombudsman role to channel community concerns to the appropriate city and state agencies for action. EPA Region 2 also served on the City's Fresh Kills Closure Task Force and raised community concerns.

In November 1998, EPA Region 2 co-organized a National Environmental Justice Advisory Committee (NEJAC) tour of waste transfer stations in New York City. Both Congressman Serrano and Congresswoman Nydia Velazquez participated in the event. In addition, Congressman Serrano secured \$3.85 million in Special Appropriations, which EPA used to provide a series of grants between 1999 and 2009 to the NYU School of Medicine and NYU's Wagner Graduate School of Public Service. The funds were also used in the South Bronx for air monitoring studies, human exposure studies at schools, Geographic Information Systems mapping and community education and engagement.

As a result of EPA's involvement in the South Bronx and similar impacted communities, EPA published "*Waste Transfer Stations: A Manual for Decision-Making*" in 2002."²⁰ In publishing this document, EPA intended to help state and local decision makers understand best practices for waste transfer station siting and

¹⁸ Administrative Complaint supplement letter from Congressman Serrano to Ann Goode, Director, OCR, EPA, page 4 (December 23, 1998).

¹⁹ *Id.*

²⁰ EPA's Office of Solid Waste, members of the Solid Waste Association of North America Focus Group and the NEJAC Waste Transfer Station Working Group reviewed and provided comments on this draft document.

operation. In the years since the complaint was filed, changes made by New York City and the NYSDEC in planning, policy, regulatory and enforcement actions, as further discussed in this letter, have improved environmental conditions in the community in terms of waste transfer station impacts.

NYSDEC'S COMMISSIONER POLICY 29

On March 19, 2003, NYSDEC issued Commissioner Policy 29 (CP-29),²¹ which applies to C&D facilities. This policy provides guidance for incorporating environmental justice concerns into the NYSDEC's environmental permit review process and its application of the State Environmental Quality Review Act. The policy also incorporates environmental justice concerns into some aspects of the NYSDEC's enforcement program, grants program and public participation provisions.

For example, upon initial receipt of a solid waste permit application or application to increase the design capacity or tonnage allowed for management under an existing permit, NYSDEC conducts a preliminary screen to identify whether the proposed action is in or near a potential environmental justice area(s) and to determine whether potential adverse environmental impacts related to the proposed action are likely to affect a potential environmental justice area(s).²² This determination is made through the use of a geographic information system application that examines the potential adverse environmental impacts on any census block groups that have either low-income or minority communities, each of which is defined in CP-29.²³ Those permit applications which possibly may have impacts on potential environmental justice areas were subject to the procedural requirements contained in CP-29.²⁴ A common trait among those types of applications is the requirement for the development of an enhanced public outreach plan to engage the public in a dialogue on potential project impacts.²⁵

DSNY'S COMPREHENSIVE SOLID WASTE MANAGEMENT PLAN

In September 2006, DSNY submitted its Comprehensive Solid Waste Management Plan (SWMP) to NYSDEC.²⁶ According to DSNY, a key principle that guided the development of the SWMP was to "treat each borough fairly;" i.e., that responsibility for the City's waste management system should be allocated equitably throughout the City, in each of the five boroughs.²⁷ The SWMP called for the establishment of four converted marine transfer stations (MTS) – two in

²¹ <http://www.dec.ny.gov/regulations/36951.html>.

²² *Id.*

²³ *Id.*

²⁴ Letter with list of WTSs in Community Boards 1 and 2 in 1998 and 2013 from Kenneth B. Brezner, P.E., Regional Materials Management Engineer, NYSDEC, Region 2 to Vicki Simons, Acting Director, OCR, EPA (May 15, 2013).

²⁵ *Id.*

²⁶ Letter from Carl Johnson, Deputy Commissioner, NYDEC to Harry Szarpanski, P.E., Assistant Commissioner, DSNY (October 27, 2006).

²⁷ http://www1.nyc.gov/assets/dsny/downloads/pdf/about/laws/swmp_exec_summary.pdf.

Brooklyn, one in Queens, and one in Manhattan, as well as a truck-to-rail waste transfer station in Staten Island - as key elements to support this principle. NYSDEC approved the SWMP on October 27, 2006.²⁸ With regard to implementation of the SWMP, DSNY entered into a 20-year contract with Waste Management, Inc. to deliver all Bronx refuse to the Harlem River Yards facility, where it will be transported for final disposal outside of the City via rail.²⁹

Moreover, the SWMP, which NYSDEC approved, states that DSNY will improve conditions at waste transfer stations, including those in the South Bronx, by taking actions identified in its SWMP, which include:

- Implement more stringent operation and maintenance requirements, such as restrictions on air emission from stationary equipment and non-road vehicles and installation of state-of-the-art odor control equipment at all putrescible transfer stations;
- Impose limitations on the siting of new solid waste transfer stations and the expansion of existing facilities;
- Address truck traffic by conducting a feasibility study of redirecting truck routes; and
- Redistribute/limit capacity in communities with greatest concentration of transfer stations.

II. FACTUAL FINDINGS

EPA gathered information from NYSDEC and DSNY regarding the Triboro Fibers facility and the A.J. Recycling facility, as well as information about overall changes that have affected WTSs in New York City in recent years.

A. ALLEGATION 1 - NYSDEC'S RENEWAL OF SOLID WASTE PERMITS FOR THE TRIBORO FIBERS FACILITY ON FEBRUARY 10, 1998, AND RENEWAL OF A PERMIT FOR THE A.J. RECYCLING FACILITY ON MAY 5, 1998, RESULTS IN A DISCRIMINATORY EFFECT ON AFRICAN AMERICANS AND HISPANICS.

Triboro Fibers Facility

The Triboro Fibers facility has not operated at the 770 Barry Street address since September 10, 2003.³⁰ NYSDEC provided OCR with the letter that described the closure certification for the Triboro Fibers facility, which was a facility leased by Triboro Fibers, Inc. to sort, recycle and ship newsprint and related paper recyclables.

An NYSDEC inspection of the Triboro Fibers facility took place prior to April 29, 2003, which verified that there was no waste or recyclable material visible outside

²⁸ *Id.*

²⁹ *Id.*

³⁰ Letter from Earth Tech Northeast, Inc. to Armand De Angelis, Division of Solid and Hazardous Materials, Region 2, NYSDEC (July 10, 2003).

the storage areas.³¹ This location is now occupied by a local food supplier, Casablanca Commissary, Inc.³² NYSDEC conducted a final inspection on September 8, 2003, in order to determine compliance with the closure requirements of 6 CRR-NY Part 360.³³

Triboro Fibers Inc. requested that an environmental engineering consultant company, Earth Tech Northeast, Inc., assist in completing the facility's closure certification. On June 3, 2003, Earth Tech Northeast, Inc. performed a closure certification inspection of the facility and found no evidence of any remaining recyclables.³⁴

Because the Triboro Fibers facility at the 770 Barry Street location is no longer operational, the allegation as to this facility is rendered moot. Accordingly, OCR is administratively closing the portion of the complaint against NYSDEC involving Triboro Fibers and will take no further action on it effective the date of this letter.

A.J. Recycling Facility

As noted previously, NYDEC regulated A.J. Recycling as a permitted facility because it processes C&D debris that is contaminated and/or commingled with other solid waste.

A.J. Recycling Facility's Permit

OCR's inquiry revealed that NYSDEC has made changes in its permit requirements for C&D debris processing facilities, such as A.J. Recycling. Specifically, NYSDEC requires that all processing, tipping, storage, compaction and related activity be conducted in an enclosed or covered area.³⁵ Moreover, the SWMP, which was approved by NYSDEC, states that DSNY will address the siting of C&D facilities and other waste facilities in the South Bronx community by meeting the stated goals of its SWMP, which include:

³¹ *Id.*

³² <http://www.nyc.gov/html/doh/downloads/pdf/cdp/licensed-commissaries-depots.pdf>.

³³ 6 NYCRR 360-1.14(w). The requirements under this regulation include the following:
The owner or operator of any active or inactive solid waste management facility must, upon termination of use, properly close that facility and must monitor and maintain such closure so as to minimize the need for further maintenance or corrective actions and to prevent or remedy adverse environmental or health impacts such as, but not limited to, contravention of surface water and groundwater quality standards, gas migration, odors and vectors. Termination of use includes those situations where a facility has not received solid waste for more than one year, unless otherwise provided by permit, or if the permit has expired. Termination of use also results from permit denial or order of the commissioner or of a court. Specific closure measures which may also include corrective actions as specified in this Part are subject to approval by the department.

³⁴ Letter from Earth Tech Northeast, Inc. to Armand De Angelis, Division of Solid and Hazardous Materials, Region 2, NYSDEC. (July 10, 2003).

³⁵ 6 NYCRR 360-11.4

- Expansion of barge and rail export of commercial waste;
- Redistribution of commercial waste flow;
- Minimizing truck trips associated with disposal of Manhattan's commercial waste; and
- Limiting siting of new facilities in communities with the greatest concentration of transfer stations.³⁶

OCR also learned that facilities possessing a Part 360 permit, including the A.J. Recycling facility, must operate with special permit conditions.³⁷ These special conditions, which were present in the A.J. Recycling facility's 2011 permit, include, but are not limited to the following:

Except as provided in subparagraph (b) of this Special Condition, any proposed change, including but not limited to one that would (i) affect the hours of facility operation; or (ii) increase the volume(s) or vary the type(s) of any waste accepted at the facility; or (iii) increase the parking or queuing of vehicles associated with the subject facility; or (iv) increase the physical extent of the facility; or (v) increase the transportation, noise, odor, dust, or other impact of the facility, requires prior written authorization from the Department in the form of a permit or permit modification. No such change is to be initiated unless and until first obtaining such permit or permit modification.³⁸

There must be no on-street truck queuing in association with the operation of the subject facility.³⁹

Before changing the time that a facility processing or storage area would be periodically cleared of material, as specified in Section 4.16 of the Engineering Report cited in Special Condition 16, above, the Permittee must request such change in writing and receive the Department's written authorization for such change.⁴⁰

DSNY has renewed the facility's permit annually since 2003.⁴¹ To obtain renewal, the facility must remain in compliance with DSNY's operating rules and with the applicable regulations of the NYSDEC.⁴² Renewal requires payment of a fee and

³⁶ http://www1.nyc.gov/assets/dsny/downloads/pdf/about/laws/swmp_exec_summary.pdf.

³⁷ The New York State SWMP administers Part 360 permits, registrations, variances and other permit-related determinations regarding the construction and operation of solid waste management facilities. See also <http://www.dec.ny.gov/chemical/8498.html>.

³⁸ A.J. Recycling Inc., DEC Permit No. 2-6007-00137/00001 page 3 17. a (June 29, 2011).

³⁹ *Id.* at 4. 24.

⁴⁰ *Id.* at 4. 27.

⁴¹ Letter from Steven N. Brautigam, Assistant Commissioner, DSNY to Vicki Simons, Acting Director, OCR, EPA at page 2. (July 10, 2013).

⁴² *Id.*

submission of an annual report by a certified engineer that the facility complies with applicable manufacturing district performance standards of NYC's Zoning Resolution, which relate to noise, particulate matter, odor and enclosure.⁴³

As required by New York Code of Regulations, the A.J. Recycling facility is listed in New York City's SWMP as one of the private facilities upon which the City/planning unit relies to process commercial sector solid waste, including waste from residential construction and renovation projects.⁴⁴ Pursuant to DSNY's authority under the City Charter and Administrative Code, DSNY's regulation involves regular inspections (3-4 full inspections, plus several drive-by inspections per month).⁴⁵ DSNY issued a permit modification in 2003 to allow A.J. Recycling to expand the area of its facility by adding lots 340 and 342, which did not involve any increase in storage or throughput volume or additional processing equipment.⁴⁶ An environmental review was conducted for the facility and a Negative Declaration was issued in support of the finding that the expansion would not result in a significant adverse environmental impact.⁴⁷

The A.J. Recycling facility was granted a permit renewal on May 5, 1998, through May 2003, which outlined a number of changes, including the authorization to install a sand interceptor and detention tank in a vacant lot.⁴⁸ As listed below, additional permit modifications include both operational changes and site reconfigurations:

- On December 1, 2004, a monitor account was added. (This resulted in an increase in NYSDEC inspections at the facility).⁴⁹
- On March 12, 2007, the facility added a misting system (misting system increases dust control).⁵⁰
- On June 29, 2011, the facility added a picking station, scale, and another lot across the street. (The picking station increases recycling, the scale addresses the Department of Transportation's road weight restrictions and the additional lot accommodates truck queuing).⁵¹

⁴³ *Id.*

⁴⁴ *Id.* at 1-2.

⁴⁵ Letter from Steven N. Brautigam, Assistant Commissioner, DSNY to Vicki Simons, Acting Director, OCR at page 2, EPA. (July 10, 2013). *Id.* at 1.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Permit renewal letter from John J. Ferguson, Regional Permit Administrator, NYSDEC, Division of Environmental Permits, Region 2 Office to Paul D. Casowitz, Sive, Paget & Riesel. (May 5, 1998).

⁴⁹ Email from Kenneth B. Brezner, P.E., Regional Materials Management Engineer, Region 2, Division of Materials Management, NYSDEC to George Pavlou, Deputy Regional Administrator, Region 2, EPA. (November 25, 2011).

⁵⁰ *Id.*

⁵¹ *Id.*

In 2009, DSNY reviewed an application to reconfigure the facility and authorized the following:

- Add three lots across from the Faile Street address, to provide truck staging, truck scales and waste truck queuing as part of facility operations. This would improve the facility operations, and reduce the queuing of trucks on local streets;⁵²
- Replace a diesel-powered screener with an electrical power screener which will produce lower emissions. No increase in daily throughput volume was requested. An environmental review of this proposed permit modification, including a review of air quality impacts conducted by the City's air quality staff of the Department of Environmental Protection, found that it would not result in significant adverse environmental impacts.⁵³

Lastly, OCR's review of records for the A.J. Recycling facility included inspection reports dating back to the mid-1990s to FY 2015, which show that there have been no significant operating violations.

A.J. Recycling Facility's Effect on Air Quality

The complaint expressed concerns regarding the effect of facility operations on air quality and health in the South Bronx. To assess the air quality effects of the AJ Recycling facility operations, EPA reviewed a detailed air quality analysis performed by the facility's consultant for the permit modifications proposed in 2009-2010.

Specifically, OCR reviewed A.J. Recycling's Air Quality Analysis reports, dated September 14, 2009, and October 15, 2010 prepared by Galli Engineering, P.C. and Sandstone Environmental Associates, Inc. Both documents were developed to satisfy New York City's Environmental Quality Review (CEQR) obligations as outlined in the CEQR Technical Manual.

The CEQR is New York City's "process for implementing the State of New York's Environmental Quality Review Act (SEQRA), by which agencies of the City of New York review proposed discretionary actions to identify and disclose the potential effects those actions may have on the environment."⁵⁴ Furthermore, "SEQRA permits a local government to promulgate its own procedures, provided they are no less protective of the environment, public participation, and judicial review than provided for by the state rules."⁵⁵

⁵² Letter from Steven N. Brautigam, Assistant Commissioner, DSNY to Vicki Simons, Acting Director, OCR, EPA at page 4. (July 10, 2013).

⁵³ *Id.*

⁵⁴ City Environmental Quality Review Technical Manual, Revised May 2010, p. 1-1.

⁵⁵ *Id.*

The CEQR Technical Manual defines the criteria for proposed action conditions which mandate air quality evaluations.⁵⁶ The CEQR Technical Manual was adopted in 1991 and subsequently revised in 2001, 2010, 2012, and 2014. As part of the OCR inquiry, OCR did not review each of the CEQR Technical Manuals or the associated guidance documents to determine the operational compliance with the local requirements or re-run the air quality models to identify and confirm the accuracy of the results. Each of the air models was used in general accordance with the specifications outlined in the respective technical manual that was in effect at the time of the performance.

As highlighted in Table 1 below, A.J. Recycling's proposed modifications satisfied two (2) of the proposed action conditions that resulted in the performance of air quality evaluations for the site.

Table 1⁵⁷
CEQR Criteria for Scope of Work

Criteria	Proposed Action Conditions	Analysis Required
Actions generating 100 or more peak-hour auto trips	The maximum number of additional vehicular trips in an hour would be 10.	No
Actions resulting in a substantial number of diesel vehicle trips	Based on NYCDEP's current screening procedures, the threshold volume of truck trips would be total emissions equivalent to 2008 PM _{2.5} emissions from 12, 19, or 23 Heavy Duty Diesel Vehicles, depending on the roadway type. This is higher than the maximum hourly increment of 10 truck trips.	No
Actions using fossil fuels for HVAC systems	No fossil fuel would be used for HVAC.	No
Actions resulting in sensitive uses within 400 feet of a manufacturing or processing facility	No sensitive uses are within 400 feet of the locations of the existing or proposed areas of operations.	No
Actions resulting in any significant odors	The facility would not generate odors.	No
Actions that would include operation of manufacturing or processing facilities	The facility would generate combustion pollutants from equipment used to process the waste.	Yes

⁵⁶ *Id.*

⁵⁷ Gall Engineering, P.C and Sandstone Environmental Associates, Inc.; *AIR QUALITY ANALYSIS, A.J. RECYCLING, INC., 325 Faile Street Bronx, NY 10474*; September 14, 2009, p.3.

Actions that would create non-point sources such as particles from unpaved surfaces and storage piles (fugitive dust)	Non-point sources include fuel combustion and fugitive dust emissions from trucks and equipment on the site, as well as fugitive dust emissions from materials handling such as tipping, loading, and transfer of materials.	Yes
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Although no state permits were required for the proposed actions, the total emissions were calculated to determine the potential to emit (PTE)⁵⁸ and contrasted to the state and federal significant *de minimis* criteria to demonstrate conformance with the State Implementation Plan (SIP). As a result, both documents were subsequently submitted to the NYSDEC as part of the facility's engineering records.

The scope of the air quality analysis evaluated existing and background concentrations for carbon monoxides (CO), nitrogen dioxide (NO₂), sulfur dioxide (SO₂), inhalable particulate matter (PM₁₀, and PM_{2.5}); calculated air emissions from on-site vehicles and equipment for volatile organic compounds (VOC), CO, SO₂, NO₂, and PM (10 and 2.5); and modelled air emissions from on-site sources utilizing AMS/EPA Regulatory Model (AERMOD). The modelled air concentrations were compared to the National Ambient Air Quality Standards (NAAQS), as appropriate.

The 2009 and 2010 air quality analyses evaluated potential air impacts from a 'No Action' versus 'Action' scenario associated with A.J. Recycling's proposed physical re-configuration and operational alterations, which were identified as follows:

- Installation of a new picking station in the processing yard;
- An increase in the on-site storage capacity from 800 cubic yards to 1400 cubic yards;
- The addition of three property lots to contain one 2-story building, scales, and relocated queuing area;
- The replacement of a diesel screener with an electric picking line;
- The construction of a concrete pad for the picking station; and
- Rearrangement of on-site storage on existing lots.

The A.J. Recycling facility's current and proposed operational and physical location changes generated pollutants from equipment that processed the wastestream, and non-point sources of fuel combustion from equipment and materials handling.⁵⁹ No analysis of pollutant concentrations from off-site truck traffic was included as part of the evaluation, since the maximum hourly number of truck trips (26 truck trips per hour) fell below the screening thresholds for CO and PM_{2.5}. Similarly, due to the non-putrescible nature of the wastestream, C&D debris, no analysis of odors was completed.

⁵⁸ 6 NYCRR Part 201.

⁵⁹ From Table 1 above: Non-point sources include fuel combustion and fugitive dust emissions from trucks and equipment on the site, as well as fugitive dust emissions from materials handling such as tipping, loading, and transfer of materials.

The 2009 and 2010 air modelling reports were developed independently and in accordance with applicable state and local requirements at the time of the evaluations. The October 2010 air modelling report was performed in general accordance with New York City's technical requirements and guidance documents and appears to be generally consistent with EPA's modelling guidelines. Due to the replacement of the diesel-powered screener with an electric picking station, the emissions under the proposed 'Action' scenario were lower than the emissions under the 'No Action' scenario. **See Table 2 below.** On-site equipment contributed to the majority of the pollutant emissions of CO, SO₂, and nitrogen oxides (NO_x). These results additionally stated that the material handling process (e.g., storage piles) contributed to the PM₁₀ and PM_{2.5} emissions.

Table 2⁶⁰
No Action v. Action Scenarios

	No Action	Action	Difference
Carbon Monoxide			
On-site trucks	0.13	0.15	0.02
On-site equipment	1.40	1.23	-0.17
Piles	0.00	0.00	0.00
<i>Total</i>	1.53	1.38	-0.15
Volatile Organic Compounds			
On-site trucks	0.02	0.02	0.00
On-site equipment	0.54	0.51	-0.04
Piles	0.00	0.00	0.00
<i>Total</i>	0.57	0.53	-0.04
Sulfur Dioxide			
On-site trucks	0.00	0.00	0.00
On-site equipment	1.86	1.77	-0.09
Piles	0.00	0.00	0.00
<i>Total</i>	1.86	1.77	-0.09
Nitrogen Oxides			
On-site trucks	0.17	0.20	0.03
On-site equipment	8.00	7.60	-0.40
Piles	0.00	0.00	0.00
<i>Total</i>	8.17	7.80	-0.37
PM₁₀			
On-site trucks	0.02	0.06	0.04
On-site equipment	2.73	2.65	-0.08
Piles	3.18	3.06	-0.12
<i>Total</i>	5.93	5.77	-0.16

⁶⁰ The units in Table 2 are tons/year. The No Action and Action Scenarios represent A.J. Recycling's operations before and after the proposed physical re-configuration and operational alterations, respectively. The difference in emissions between these two scenarios is shown in the last column. Note that all numbers are rounded to two decimal points.

PM2.5			
On-site trucks	0.00	0.00	0.00
On-site equipment	0.44	0.36	-0.08
Piles	0.47	0.46	-0.01
<i>Total</i>	0.91	0.82	-0.09

Based on the October 2010 air quality assessment report, the 'Action' scenario is projected to result in lower air concentrations than the (current) 'No Action' scenario for all pollutants (*i.e.*, there will be an improvement in air quality). **See Table 3 below.** For those NAAQS pollutants for which the area is designated attainment (**see Regional Air Quality Status section below**), a total (cumulative) concentration estimate was made to ensure continued attainment of those NAAQS. Background concentrations were documented based primarily on monitoring data obtained from the IS52 air quality monitoring station located in the Bronx, New York, and the NYCDEP referenced guidance. (For those NAAQS pollutants for which the area is designated nonattainment (**see Regional Air Quality Status section below**)), no total concentration estimate was appropriate; *i.e.*, the only necessary criteria were for the project to ensure a net improvement in air quality.) **As seen in Table 3 below**, the predicted 'Action' impacts in combination with existing (background) air quality levels is below the applicable standard for all NAAQS attainment air pollutants.⁶¹ In addition, the predicted 'Action' impacts reflect lower levels compared to the (current) 'No Action' impacts for the NAAQS nonattainment air pollutants.

Table 3⁶²
Action and No Action Impacts with
Background (Existing) Air Quality Levels

Pollutant	Averaging Period	Standard	Back-ground Value	Maximum Modeled Value		Total		Difference (Action - No Action)
				No Action	Action	No Action	Action	
NAAQS Nonattainment Pollutants								
PM2.5	24-hr.	35	--	18	9	--	--	-9
	Annual	15	--	2	1	--	--	-1

⁶¹ In 2010, EPA adopted new, 1-hour standards for SO₂ and NO₂. The final rulemaking for the 1-hour SO₂ standard of 75 ppb (196 ug/m³) was published in the Federal Register on June 22, 2010 (effective date of standard was August 23, 2010). The final rulemaking for the 1-hour NO₂ standard of 100 ppb (189 ug/m³) was published in the Federal Register on February 9, 2010 (effective date of standard was April 12, 2010). In 2012, EPA adopted a new annual standard for PM_{2.5}. The final rulemaking for this annual PM_{2.5} standard of 12 ug/m³ was published in the Federal Register on January 15, 2013 (effective date of standard was March 18, 2013). Because the September 14, 2009 initial air quality modelling report preceded these standards, no information is available for this report regarding compliance with them.

⁶² The units in Table 3 are ug/m³ – micrograms per cubic meters.

NAAQS Attainment Pollutants								
PM10	24-hr.	150	60	66	61	126	121	-5
CO	1-hr.	10,000	3,550	1,483	475	5,033	4,025	-1,008
	8-hr.	40,000	2,290	354	192	2,644	2,482	-162
SO2	3-hr.	1,300	228	575	391	803	619	-184
	24-hr.	365	123	243	172	686	295	-71
	Annual	80	29	5	4	34	33	-1
NOx	Annual	100	56	21	16	77	72	-5

In light of the air quality demonstration that was documented through the performance of the air quality models, as well as an examination of site-specific information, there is insufficient evidence to show that the proposed emissions from the A.J. Recycling facility cause or contribute to unhealthy air quality levels. Furthermore, there is insufficient evidence to demonstrate that the proposed emissions from the A.J. Recycling facility cause or contribute to degradation in local air quality. Therefore, there is also insufficient evidence to conclude that any emissions from the A.J. Recycling facility's proposed modifications would contribute to air quality impacts in a discriminatory manner on the basis of race, color, or national origin.

Regional Air Quality Status

During the performance of the 2009 and 2010 air quality assessments for A.J. Recycling, the facility was located in a regional area that was classified by EPA as moderate non-attainment for the 1997 8-hour ozone standard and non-attainment for the 1997 annual PM_{2.5} standard. (On November 13, 2009, the regional area was also designated non-attainment for the 2006 24-hour PM_{2.5} standard.) Under the Clean Air Act (CAA), the State of New York is one of the northeastern states located within the EPA's designated Ozone Transport Region (OTR). States located within the OTR are required to develop state implementation plans (SIPs) and implement control measures for pollutants that form ozone. In addition, during this period, the regional area was classified as attaining the NAAQS for NO₂, SO₂, CO, and lead.

As part of the regional air quality review, OCR confirmed the current regional air quality status with EPA's Region 2 office. At this time, the Bronx is still designated moderate non-attainment for the 1997 8-hour ozone standard. (Note, on May 21, 2012, the area was also designated marginal non-attainment for the 2008 8-hour ozone standard.) For PM_{2.5}, however, the Bronx is part of an area that the EPA has redesignated to attainment of the PM_{2.5} NAAQS. This redesignation was published in the Federal Register on April 18, 2014, at 79 FR 21857 and was primarily based on air quality data from the 2010 – 2012 period which show PM_{2.5} concentrations are meeting the Standard. In fact, ambient air quality data recorded in the area since the 2007 – 2009 time period have been meeting the PM_{2.5} standards. Along with the redesignation request, New York State provided a "maintenance" plan, which demonstrates how the area will continue to meet the standard. The plan also contains provisions for additional

emission reductions in the unlikely event the area violates the PM_{2.5} standard in the future.

B. ALLEGATION 2 - DSNY'S RENEWAL OF PERMITS FOR WTSS IN THE SOUTH BRONX CONTRIBUTE TO THE CLUSTERING OF WTSS AND DISPROPORTIONATE ENVIRONMENTAL AND PUBLIC HEALTH BURDENS IN TWO PREDOMINATELY MINORITY COMMUNITY DISTRICTS WHILE BENEFITING NEW YORK CITY'S PREDOMINANTLY WHITE COMMUNITY DISTRICTS.⁶³

As previously stated, while OCR initially accepted the allegations against DSNY, they were not extensively investigated because DSNY ceased to be a recipient in 2000. However, OCR requested and received additional information regarding DSNY's current permitting and regulatory practices as well as some additional information from DSNY concerning WTSS in Community Boards 1 and 2.

Additional Information Regarding DSNY WTS Siting and Operational Requirements

DSNY's revised rules for the siting of new transfer stations are progressively more stringent for areas of the City where there are currently relatively higher numbers of transfer stations.⁶⁴ In particular, for the Bronx's Community Board 2 in which A.J. Recycling is located and which has a relatively high proportion of both industrial land and transfer stations, the rules prohibit an increase in new transfer stations' daily throughput capacity unless existing capacity is reduced elsewhere in the district by the same amount; prohibit new transfer stations in light manufacturing M1 zones; and require that any new transfer station be at least 600 feet from a residence district, park, school, or hospital, and at least 400 feet from another transfer station.⁶⁵

In May 2004, DSNY promulgated final rules that imposed stricter operational requirements regarding transfer stations, including those in Community Boards 1 and 2. These operational requirements include odor control equipment, negative air pressure, and dust control measures, which affected four putrescible WTSS, five Mixed C&D facilities, including A.J. Recycling, and five Fill Material Transfer Stations located in Community Boards 1 & 2. In April 2005, DSNY promulgated final rules governing the siting of transfer stations. The siting rules apply to new facilities, while the prohibition on additional throughput capacity applies to existing facilities. Under the new rules, DSNY does not entertain applications for new transfer station facilities in certain areas of the City, including in Bronx Community Board 2. The number of transfer stations in New York City and in the Bronx's Community Boards 1 and 2 has declined considerably since 1998. A.J. Recycling is in an M3 district

⁶³ Acceptance of Complaint letter from Anne Goode, Director, OCR, EPA to Commissioner Kevin Farrell, Commissioner, DSNY. (October 25, 1999).

⁶⁴ Letter from Steven N. Brautigam, Assistant Commissioner, DSNY to Vicki Simons, Acting Director, OCR, EPA at page 3. (July 10, 2013).

⁶⁵ *Id.*

where residential uses are prohibited, so there is no residential community immediately surrounding the A.J. Recycling facility. According to DSNY, the siting and operating rules have reduced transfer station impacts on the surrounding areas.⁶⁶

DSNY amended its rules to establish more stringent operation and maintenance requirements for existing and new transfer stations in 2005. These changes included:

- New requirements for tire-cleaning procedures and site paving to address the problem of tracking dirt onto public roadways from the facility.⁶⁷
- Facilities must install state-of-the art ventilation equipment to improve the air exchange rate at putrescible transfer stations and help the escape of odors. All putrescible transfer stations must install odor control equipment to neutralize odors rather than simply mask them with another scent.⁶⁸
- Facility owners are required to keep their drains clean and unclogged to prevent leachate or wastewater runoff onto public roadways and minimize the build-up of odor-causing residue.⁶⁹

Alternatives to Waste Transfer Stations

DSNY has entered into a long-term contract for the disposal of DSNY managed Municipal Solid Waste (MSW) from the Bronx via the Waste Management Harlem River Yard transfer station, which transports waste by rail to a landfill in Virginia. This contract has eliminated the use of long-haul transfer trailers for DSNY managed MSW from the Bronx, notably in Community Boards 1 and 2.⁷⁰

According to DSNY, the SWMP has led to improvements in the environmental conditions within Community Boards 1 and 2. For example, with the completion of DSNY's Marine Transfer Station on the North Shore of Queens, deliveries of municipal solid waste from Queens are put it into containers for barge transport to an intermodal rail facility in New Jersey or Staten Island.⁷¹ This shift to barge and rail transport eliminates hundreds of truckloads per week of municipal solid waste that currently depart from Queens and traverse the Bronx *en route* to transfer and/or disposal facilities in New Jersey and New York State.⁷²

As previously noted, DSNY has contracted to construct a marine transfer station in the East River at East 91st Street in Manhattan.⁷³ When operational, the facility will

⁶⁶ See *id.* at 4-5.

⁶⁷ See *id.* at 3.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *id.* at 4.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

be able to accept commercial putrescible waste at night.⁷⁴ As Manhattan has no commercial waste transfer stations, DSNY anticipates that some of this commercial putrescible waste is currently going to facilities in Bronx Community Boards 1 and 2, and therefore the diversion of such waste to this proposed DSNY facility is expected to reduce commercial waste truck deliveries from Manhattan to putrescible waste transfer stations in these districts.⁷⁵

DSNY has implemented Best Available Retrofit Technology (BART) to its entire fleet of diesel waste and recycling collection trucks, pursuant to Local Law 39 of 2005, which has benefited the local environment near transfer stations used by DSNY, including the Harlem River Yard facility in Bronx Community Board 1.⁷⁶ Further, DSNY states that the use of ultra-low sulfur diesel, which DSNY pioneered, has resulted in a reduction in particulate matter emissions of 90% below 2006 model year levels, and 98% below the levels of old, unregulated diesel trucks, to levels comparable to emissions from compressed natural gas vehicles.⁷⁷

Moreover, DSNY's vendor for waste and recycling collection trucks, (Waste Management), has complied with Local Law 40 of 2005, which requires that non-road diesel equipment used primarily in the City to implement a solid waste disposal or recycling contract for the City of New York be retrofitted with BART.⁷⁸ According to DSNY, this has resulted in additional particulate matter emissions reductions in Bronx District 2.⁷⁹ As a result of these and other measures, DSNY asserts that the level of fine particulate matter, or PM2.5, has declined in the Bronx and in the rest of New York City to levels that now meet the NAAQS for this pollutant.⁸⁰

Letter of Agreement

In addition, OCR notes that on September 30, 2011, EPA Region 2 entered into a Letter of Agreement (LOA)⁸¹ with NYSDEC to share information about the NYSDEC's oversight of WTSs in the South Bronx, with particular attention to WTSs in Community Boards 1 and 2. The LOA is a mutual agreement intended to provide assurances to the residents of the South Bronx that there is appropriate oversight of the WTS, including recycling and C&D facilities, in their community, and that NYSDEC will provide pertinent information in this regard to EPA on a semi-annual basis. The LOA ended in July 2014 and included language that it may be extended if desired, by mutual agreement of the parties.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ LOA signed by Joseph Martens, Commissioner, and Steven C. Russo, Deputy Commissioner and General Counsel, NYSDEC and Judith Enck, U.S. EPA Region 2 Administrator, and Eric Schaaf, Regional Counsel of the U.S. EPA Region 2 (October 3, 2011).

III. CONCLUSION

As stated above, while OCR initially accepted the permit renewal process resulting in clustering of WTSs that have a disparate impact allegation against DSNY, that allegation was no longer the focus of OCR's inquiry after 2000 when DSNY ceased to be a recipient. In addition, the allegation concerning the Triboro Fibers facility at the 770 Barry Street location is now moot because this facility is no longer operational. As previously discussed in this letter, OCR has determined that it is closing the inquiry into the remaining allegations against the NYSDEC permitting of the A.J. Recycling facility as there is insufficient evidence to conclude that any emissions from the A.J. Recycling facility's proposed modifications would contribute to air quality impacts in a discriminatory manner on the basis of race, color, or national origin. This determination is not intended and should not be construed to cover any other issues that may exist and are not specifically addressed in this Letter.

Although EPA is closing the subject administrative complaint with no determination of discrimination in violation of Title VI of the Civil Rights Act of 1964, as specified above, the Agency is committed to protecting the health and environment of all communities, including the South Bronx. OCR is willing to provide technical assistance regarding compliance with federal non-discrimination obligations to any applicant for, or recipient of, federal financial assistance. Accordingly, OCR will be in contact with NYSDEC to discuss potential technical assistance opportunities.

Please note that the complainant, Congressman Serrano, may file a new complaint if he or his constituents acquire evidence that DSNY has resumed receipt of EPA federal financial assistance and future noncompliance concerns are identified. If you have any questions, we encourage you to contact the EPA offices in Region 2 to discuss this matter. Alternatively, if you have any questions about the civil rights matter, please contact Brittany Martinez, Case Manager, OCR External Compliance and Complaints Program, at (202) 564-0727.

Sincerely,



Velveta Golightly-Howell
Director

cc: Catherine McCabe, Deputy Regional Administrator
Rich Manna, Deputy Civil Rights Official
EPA Region 2

Elise Packard, Associate General Counsel
EPA Civil Rights and Finance Law Office (2399A)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
CIVIL RIGHTS

January 25, 2016

RETURN RECEIPT REQUESTED

Certified Mail #: 7015 0640 0006 0350 7107

In Reply Refer To:

EPA File No: 11R-12-R6

(b) (6)

De Berry, Texas 75639-2751

Re: Rejection of Administrative Complaint

Dear (b) (6)

Please be advised of the rejection of your administrative complaint filed with the U.S. Department of Housing and Urban Development on June 24, 2011, and subsequently referred to the U.S. Environmental Protection Agency (EPA), Office of Civil Rights (OCR) on July 13, 2012. The complaint is rejected as of the date of this letter.

Your complaint alleged race discrimination by the Texas Railroad Commission due to its approval of an amended permit for a Salt Water Waste Disposal Well (b) (6). After careful consideration, the OCR rejected the complaint for investigation because the two allegations therein were untimely filed and did not meet the jurisdictional requirements described in EPA's nondiscrimination regulations, 40 Code of Federal Regulations (C.F.R.), Part 7.

Pursuant to the EPA's nondiscrimination regulations, the OCR conducts a preliminary review of administrative complaints for acceptance, rejection, or referral to the appropriate agency. *See* 40 C.F.R. § 7.120(d) (1). For a complaint to be accepted for investigation, the complaint must meet the jurisdictional requirements described in the EPA's nondiscrimination regulations. First, the complaint must be in writing. *See* 40 C.F.R. § 7.120(b) (1). Second, the complaint must describe an alleged discriminatory act that, if true, may violate the EPA's nondiscrimination regulations (*i.e.*, an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *See* 40 C.F.R. § 7.120(b) (1). Third, the complaint must be filed within 180 calendar days of the alleged discriminatory act. *See* 40 C.F.R. § 7.120(b) (2). Finally, the complaint must be

filed against an applicant for, or a recipient of, EPA financial assistance that allegedly committed the discriminatory act. *See* 40 C.F.R. § 7.15.

The Allegations

Your complaint alleged that the Texas Railroad Commission (TRRC) discriminated against the African American community of Panola County, Texas. Specifically, you alleged that the African American community suffered discrimination because: (1) TRRC permitted EXCO Resources, Inc. to operate a commercial Saltwater Waste Disposal site in Panola County; and (2) TRRC had been negligent in enforcing regulatory standards at disposal sites in the African American community.

Allegation (1)

In a letter to you dated January 10, 2013, the OCR rejected the first allegation concerning TRRC's permitting decision due to timeliness. The TRRC denied your motion for rehearing of the granting of the permit application on October 12, 2010. Your complaint was not filed until June 24, 2011. Because you did not describe a discriminatory act that occurred within 180 days of the filing of the complaint, OCR rejected that allegation.

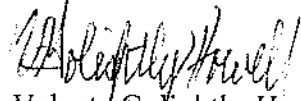
Allegation (2)

In the letter referenced above, the OCR also explained it was not able to identify sufficient information in the complaint, or the accompanying affidavit, to conduct a preliminary review of your second allegation that TRRC discriminated against African Americans in Panola County by failing to enforce regulatory standards at disposal sites in their community, and requested that you submit additional information to support that allegation.

In response to the OCR's request, you forwarded a letter that had been submitted to the EPA Regional Office in Dallas, Texas, on February 19, 2013. The forwarded letter alleged, as the second discriminatory act, that a faulty Superfund assessment was conducted on December 4, 2010. Allegations under Title VI are considered timely if filed within 180 days of the alleged discriminatory act. The complaint was filed on June 24, 2011, which is outside of the 180-day filing requirement for the alleged trigger event conducted on December 4, 2010. As you did not provide any information relating to an alleged discriminatory action that occurred within 180 days of filing the complaint and considering the passage of time between the alleged discriminatory act and that date, your second claim is also rejected for investigation.

If you feel that the circumstances have changed and that you have current concerns, or additional information raising an allegation of discrimination that OCR should consider, you may wish to file a new complaint. Please feel free to contact Samuel Peterson of the OCR's External Compliance Program by telephone at (202) 564-5393, or via e-mail at peterson.samuel@epa.gov, if you have any questions.

Sincerely,



Velveta Gofightly-Howell
Director
Office of Civil Rights

cc: Elise Packard
Associate General Counsel
Civil Rights and Finance Law Office

Samuel Coleman
Deputy Regional Administrator
Deputy Civil Rights Official
EPA Region 6



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

January 25, 2016

OFFICE OF
CIVIL RIGHTS

RETURN RECEIPT REQUESTED

Certified Mail #: 7015 0640 0006 0305 7114

In Reply Refer To:

EPA File No: 11R-12-R6

Mr. Lindil Fowler
Acting Executive Director
Texas Railroad Commission
1700 North Congress Avenue
Austin, Texas 78711-1496

Re: Rejection of Administrative Complaint

Dear Mr. Fowler:

Please be advised of the rejection of an administrative complaint filed with the U.S. Department of Housing and Urban Development on June 24, 2011, and subsequently referred to the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) on July 13, 2012. The complaint is rejected as of the date of this letter.

The subject complaint alleged discrimination on the basis of race (i.e., African American) by the Texas Railroad Commission due to its approval of an amended permit for a Salt Water Waste Disposal Well near the complainant's home. After careful consideration, the OCR rejected the complaint for investigation because the two allegations therein were untimely filed and did not meet the jurisdictional requirements described in EPA's nondiscrimination regulations. 40 Code of Federal Regulations (C.F.R.), Part 7.

Pursuant to the EPA's nondiscrimination regulations, the OCR conducts a preliminary review of administrative complaints for acceptance, rejection, or referral to the appropriate agency. *See* 40 C.F.R. § 7.120(d) (1). For a complaint to be accepted for investigation, the complaint must meet the jurisdictional requirements described in the EPA's nondiscrimination regulations. First, the complaint must be in writing. *See* 40 C.F.R. § 7.120(b) (1). Second, the complaint must describe an alleged discriminatory act that, if true, may violate the EPA's nondiscrimination regulations (i.e., an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *See* 40 C.F.R. § 7.120(b) (1). Third, the complaint must be filed within 180 calendar days of the alleged discriminatory act. *See* 40 C.F.R. § 7.120(b) (2). Finally, the complaint must be filed against an applicant for, or a recipient of, EPA financial assistance that allegedly committed the discriminatory act. *See* 40 C.F.R. § 7.15.

The Allegations

The complaint alleged that the Texas Railroad Commission (TRRC) discriminated against the African American community of Panola County, Texas. Specifically, the complainant alleged that the African American community suffered discrimination because: (1) TRRC permitted EXCO Resources, Inc. to operate a commercial Saltwater Waste Disposal site in Panola County; and (2) TRRC had been negligent in enforcing regulatory standards at disposal sites in the African American community.

Allegation (1)

In a letter to the complainant dated January 10, 2013, the OCR rejected the first allegation concerning TRRC's permitting decision due to timeliness. The TRRC denied the complainant's motion for rehearing of the granting of the permit application on October 12, 2010. The complaint was not filed until June 24, 2011. Because the complaint did not describe a discriminatory act that occurred within 180 days of the filing of the complaint, OCR rejected the referenced allegation.


Allegation (2)

In the letter referenced above, the OCR also explained it was not able to identify sufficient information in the complaint, or the accompanying affidavit, to conduct a preliminary review of the second allegation that TRRC discriminated against African Americans in Panola County by failing to enforce regulatory standards at disposal sites in their community, and requested that the complainant submit additional information to support that allegation.

In response to the OCR's request, the complainant forwarded a letter that had been submitted to the EPA Regional Office in Dallas, Texas, on February 19, 2013. The forwarded letter alleged, as the second discriminatory act, that a faulty Superfund assessment was conducted on December 4, 2010. Allegations under Title VI are considered timely if filed within 180 days of the alleged discriminatory act. The complaint was filed on June 24, 2011, which is outside of the 180-day filing requirement for the alleged trigger event conducted on December 4, 2010. As the complainant did not provide any information relating to an alleged discriminatory action that occurred within 180 days of filing the complaint, the OCR also rejected the second allegation for investigation.

If you have any questions, please contact Samuel Peterson of the OCR's External Compliance Program by telephone at (202) 564-5393, or by e-mail at peterson.samuel@epa.gov.

Sincerely,


Velveta Golightly-Howell
Director
Office of General Council

cc: Elise Packard
Associate General Counsel
Civil Rights and Finance Law Office

Samuel Coleman
Deputy Regional Administrator
Deputy Civil Rights Official
U.S. EPA Region 6



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL - 2 2014

Return Receipt Requested

Certified Mail#: 7004-1160-0002-3622-9742

In Reply Refer to:

EPA File No.: 13R-13-R6

Waller County Commissioners Court
836 Austin Suite 203
Hempstead, TX 77445-4672

Re: Rejection of Administrative Complaint No. 13R-13-R6

Dear Commissioners Amsler, Pokluda, Barnett and Kitzman and Judge Beckendorff:

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is rejecting, without prejudice, the administrative complaint, No. 13R-13-R6, filed against the Texas Commission on Environmental Quality (TCEQ) received on August 12, 2013. The EPA is rejecting the allegations against the Waller County Commissioners Court found in the same complaint. The complaint generally alleges that the respondents violated Title VI of the Civil Rights Act of 1964, as amended 42 U.S.C. 2000d *et seq*, and the EPA's nondiscrimination regulations found at 40 C.F.R Part 7.

Pursuant to the EPA's nondiscrimination administrative regulations, the OCR conducts a preliminary review of administrative complaints for acceptance, rejection, or referral to the appropriate Agency. (See 40 C.F.R. § 7.120(d)(1).) For a complaint to be accepted for investigation, the complaint must meet the jurisdictional requirements described in the EPA's nondiscrimination regulations. First, the complaint must be in writing. (See 40 C.F.R. § 7.120(b)(1).) Second, the complaint must describe an alleged discriminatory act that, if true, may violate the EPA's nondiscrimination regulations (i.e., an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *Id.* Third, the complaint must be filed within 180 calendar days of the alleged discriminatory act. (See 40C.F.R. §7.120(b)(2).) Finally, the complaint must be filed against an applicant for, or a recipient of, EPA financial assistance that allegedly committed the discriminatory act. (See 40 C.F.R. § 7.15.) For your reference, we have enclosed a copy of the EPA's nondiscrimination regulations.

The OCR is rejecting, without prejudice, the following allegation for investigation:

- (1) The TCEQ's approval of a registration application that will allow for the construction and operation of a transfer station located at the Pintail Landfill had a disparate impact on the minority community residents of Hempstead.

In general, the OCR will "dismiss complaints without prejudice if the issues raised in the complaint are the subject of either ongoing administrative permit appeals or litigation in Federal or state court because the outcome of such permit appeals or litigation could affect the circumstances surrounding the complaint and any investigation that OCR may conduct." (65 Fed. Reg. 39673)

On March 20, 2013 the City of Hempstead filed suit against Waller County in state court seeking to enjoin Resolution 2013-001, due to various deficiencies in the resolution. This case, *City of Hempstead v. Waller County, et. al.*, (Case No. 13-03-21872), is ongoing as of the date of this letter. Given that this litigation could affect the circumstances surrounding a potential investigation involving TCEQ, the OCR is rejecting this allegation without prejudice.

The complaint can be refiled for jurisdictional review within sixty (60) calendar days of the conclusion of the litigation. However, if "the state court reviewed evidence presented by both parties and issued a decision, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process." See 65 Fed. Reg. 39673.

The OCR is rejecting the following allegation for investigation because does not meet the EPA's jurisdictional requirements:

- (2) Waller County's adoption of an ordinance and licensing agreement with Pintail Landfill, LLC, allowing a municipal solid waste landfill and transfer station to be located within Hempstead's extraterritorial jurisdiction discriminated against the minority residents of Hempstead.

This allegation does not meet the EPA's jurisdictional requirements because the Waller County Commissioners Court is not a recipient of the EPA's financial assistance. Thus, this allegation does not meet EPA's jurisdictional criteria, regardless of the ongoing litigation, and the OCR is rejecting it for investigation.

If you have questions regarding this letter, please contact Jerett Yan at (202) 564-3113, or via e-mail at yan.jerett@epa.gov.

Sincerely,



Velveta Golightly-Howell
Director

Enclosures

cc: Kenneth Redden, Acting Assistant General Counsel
Civil Rights and Finance Law Office (MC 2399A)

Samuel Coleman
Deputy Civil Rights Official
U.S. EPA Region VI

Deanna Jang
Chief, Federal Coordination and Compliance Section
U.S. Department of Justice, Civil Rights Division

Bryan Greene
Acting Assistant Secretary for Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development

Camille M. Hazeur
Director, Office of Civil Rights
U.S. Department of Transportation

Megan Mack
Officer for Civil Rights and Civil Liberties
U.S. Department of Homeland Security



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL - 2 2014

Return Receipt Requested

Certified Mail#: 7004-1160-0002-3622-9711

In Reply Refer to:

EPA File No.: 13R-13-R6

Mr. Steve McCraw
Director, Texas Department of Public Safety
P O Box 4087
Austin, Texas 78773-0001

Re: Rejection of Administrative Complaint No. 13R-13-R6

Dear Director McCraw:

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is rejecting, without prejudice, the administrative complaint, No. 13R-13-R6, filed against the Texas Commission on Environmental Quality (TCEQ) received on August 12, 2013. The EPA is rejecting the allegations against the Waller County Commissioners Court found in the same complaint. The complaint generally alleges that the respondents violated Title VI of the Civil Rights Act of 1964, as amended 42 U.S.C. 2000d *et seq*, and the EPA's nondiscrimination regulations found at 40 C.F.R Part 7.

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If you have questions regarding this letter, please contact Jerett Yan at (202) 564-3113, or via e-mail at yan.jerett@epa.gov.

Sincerely,



Velveta Golightly-Howell
Director

Enclosures

cc: Kenneth Redden, Acting Assistant General Counsel
Civil Rights and Finance Law Office (MC 2399A)

Samuel Coleman
Deputy Civil Rights Official
U.S. EPA Region VI

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U.S. Department of Transportation

Megan Mack
Officer for Civil Rights and Civil Liberties
U.S. Department of Homeland Security



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL - 2 2014

Return Receipt Requested

Certified Mail# 7004-1160-0002-3622-9728

In Reply Refer to:

EPA File No. 13R-13-R6

Mr. Art Pertille
Olson & Olson LLP
Wortham Tower, Ste 600
2727 Allen Parkway
Houston, TX 77019-2133

Re: Rejection of Administrative Complaint No. 13R-13-R6

Dear Mr. Pertille:

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is rejecting, without prejudice, the administrative complaint, No. 13R-13-R6, filed against the Texas Commission on Environmental Quality (TCEQ) received on August 12, 2013. The EPA is rejecting the allegations against the Waller County Commissioners Court found in the same complaint. The complaint generally alleges that the respondents violated Title VI of the Civil Rights Act of 1964, as amended 42 U.S.C. 2000d *et seq.*, and the EPA's nondiscrimination regulations found at 40 C.F.R. Part 7.

Pursuant to the EPA's nondiscrimination administrative regulations, the OCR conducts a preliminary review of administrative complaints for acceptance, rejection, or referral to the appropriate Agency. (See 40 C.F.R. § 7.120(d)(1).) For a complaint to be accepted for investigation, the complaint must meet the jurisdictional requirements described in the EPA's nondiscrimination regulations. First, the complaint must be in writing. (See 40 C.F.R. § 7.120(b)(1).) Second, the complaint must describe an alleged discriminatory act that, if true, may violate the EPA's nondiscrimination regulations (i.e., an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *Id.* Third, the complaint must be filed within 180 calendar days of the alleged discriminatory act. (See 40 C.F.R. § 7.120(b)(2).) Finally, the complaint must be filed against an applicant for, or a recipient of, EPA financial assistance that allegedly committed the discriminatory act. (See 40 C.F.R. § 7.15.) For your reference, we have enclosed a copy of the EPA's nondiscrimination regulations.

The OCR is rejecting, without prejudice, the following allegation for investigation:

- (1) The TCEQ's approval of a registration application that will allow for the construction and operation of a transfer station located at the Pintail Landfill had a disparate impact on the minority community residents of Hempstead.

In general, the OCR will "dismiss complaints without prejudice if the issues raised in the complaint are the subject of either ongoing administrative permit appeals or litigation in Federal or state court because the outcome of such permit appeals or litigation could affect the circumstances surrounding the complaint and any investigation that OCR may conduct." (65 Fed. Reg. 39673)

On March 20, 2013 the City of Hempstead filed suit against Waller County in state court seeking to enjoin Resolution 2013-001, due to various deficiencies in the resolution. This case, *City of Hempstead v. Waller County, et. al.*, (Case No. 13-03-21872), is ongoing as of the date of this letter. Given that this litigation could affect the circumstances surrounding a potential investigation involving TCEQ, the OCR is rejecting this allegation without prejudice.

The complaint can be refiled for jurisdictional review within sixty (60) calendar days of the conclusion of the litigation. However, if "the state court reviewed evidence presented by both parties and issued a decision, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process." *See* 65 Fed. Reg. 39673.

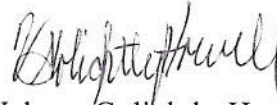
The OCR is rejecting the following allegation for investigation because does not meet the EPA's jurisdictional requirements:

- (2) Waller County's adoption of an ordinance and licensing agreement with Pintail Landfill, LLC, allowing a municipal solid waste landfill and transfer station to be located within Hempstead's extraterritorial jurisdiction discriminated against the minority residents of Hempstead.

This allegation does not meet the EPA's jurisdictional requirements because the Waller County Commissioners Court is not a recipient of the EPA's financial assistance. Thus, this allegation does not meet EPA's jurisdictional criteria, regardless of the ongoing litigation, and the OCR is rejecting it for investigation.

If you have questions regarding this letter, please contact Jerett Yan at (202) 564-3113, or via e-mail at yan.jerett@epa.gov.

Sincerely,



Velveta Golightly-Howell
Director

Enclosures

cc: Kenneth Redden, Acting Assistant General Counsel
Civil Rights and Finance Law Office (MC 2399A)

Samuel Coleman
Deputy Civil Rights Official
U.S. EPA Region VI

Deanna Jang
Chief, Federal Coordination and Compliance Section
U.S. Department of Justice, Civil Rights Division

Bryan Greene
Acting Assistant Secretary for Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development

Camille M. Hazeur
Director, Office of Civil Rights
U.S. Department of Transportation

Megan Mack
Officer for Civil Rights and Civil Liberties
U.S. Department of Homeland Security



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL - 2 2014

Return Receipt Requested

Certified Mail#: 7004-1160-0002-3622-9735

In Reply Refer to:

EPA File No.: 13R-13-R6

Mr. Brian Shaw
Chairman, Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

Re: Rejection of Administrative Complaint No. 13R-13-R6

Dear Chairman Shaw:

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is rejecting, without prejudice, the administrative complaint, No. 13R-13-R6, filed against the Texas Commission on Environmental Quality (TCEQ) received on August 12, 2013. The EPA is rejecting the allegations against the Waller County Commissioners Court found in the same complaint. The complaint generally alleges that the respondents violated Title VI of the Civil Rights Act of 1964, as amended 42 U.S.C. 2000d *et seq*, and the EPA's nondiscrimination regulations found at 40 C.F.R Part 7.

Pursuant to the EPA's nondiscrimination administrative regulations, the OCR conducts a preliminary review of administrative complaints for acceptance, rejection, or referral to the appropriate Agency. (See 40 C.F.R. § 7.120(d)(1).) For a complaint to be accepted for investigation, the complaint must meet the jurisdictional requirements described in the EPA's nondiscrimination regulations. First, the complaint must be in writing. (See 40 C.F.R. § 7.120(b)(1).) Second, the complaint must describe an alleged discriminatory act that, if true, may violate the EPA's nondiscrimination regulations (i.e., an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *Id.* Third, the complaint must be filed within 180 calendar days of the alleged discriminatory act. (See 40 C.F.R. § 7.120(b)(2).) Finally, the complaint must be filed against an applicant for, or a recipient of, EPA financial assistance that allegedly committed the discriminatory act. (See 40 C.F.R. § 7.15.) For your reference, we have enclosed a copy of the EPA's nondiscrimination regulations.

The OCR is rejecting, without prejudice, the following allegation for investigation:

- (1) The TCEQ's approval of a registration application that will allow for the construction and operation of a transfer station located at the Pintail Landfill had a disparate impact on the minority community residents of Hempstead.

In general, the OCR will "dismiss complaints without prejudice if the issues raised in the complaint are the subject of either ongoing administrative permit appeals or litigation in Federal or state court because the outcome of such permit appeals or litigation could affect the circumstances surrounding the complaint and any investigation that OCR may conduct." (65 Fed. Reg. 39673)

On March 20, 2013 the City of Hempstead filed suit against Waller County in state court seeking to enjoin Resolution 2013-001, due to various deficiencies in the resolution. This case, *City of Hempstead v. Waller County, et. al.*, (Case No. 13-03-21872), is ongoing as of the date of this letter. Given that this litigation could affect the circumstances surrounding a potential investigation involving TCEQ, the OCR is rejecting this allegation without prejudice.

The complaint can be refiled for jurisdictional review within sixty (60) calendar days of the conclusion of the litigation. However, if "the state court reviewed evidence presented by both parties and issued a decision, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process." *See* 65 Fed. Reg. 39673.

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This allegation does not meet the EPA's jurisdictional requirements because the Waller County Commissioners Court is not a recipient of the EPA's financial assistance. Thus, this allegation does not meet EPA's jurisdictional criteria, regardless of the ongoing litigation, and the OCR is rejecting it for investigation.

If you have questions regarding this letter, please contact Jerett Yan at (202) 564-3113, or via e-mail at yan.jerett@epa.gov.

Sincerely,



Velveta Golightly-Howell
Director

Enclosures

cc: Kenneth Redden, Acting Assistant General Counsel
Civil Rights and Finance Law Office (MC 2399A)

Samuel Coleman
Deputy Civil Rights Official
U.S. EPA Region VI

Deanna Jang
Chief, Federal Coordination and Compliance Section
U.S. Department of Justice, Civil Rights Division

Bryan Greene
Acting Assistant Secretary for Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development

Camille M. Hazeur
Director, Office of Civil Rights
U.S. Department of Transportation

Megan Mack
Officer for Civil Rights and Civil Liberties
U.S. Department of Homeland Security



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WASHINGTON, D.C. 20460

JUL - 2 2014

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CIVIL RIGHTS

Return Receipt Requested

Certified Mail#:7004-1160-0002-3622-9704

In Reply Refer to:

EPA File No. 13R-13-R6

Mr. Ted Houghton
Chair, Texas Transportation Commission
125 East 11th St.
Austin, Texas 78701

Re: Rejection of Administrative Complaint No. 13R-13-R6

Dear Commissioner Houghton:

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) is rejecting, without prejudice, the administrative complaint, No. 13R-13-R6, filed against the Texas Commission on Environmental Quality (TCEQ) received on August 12, 2013. The EPA is rejecting the allegations against the Waller County Commissioners Court found in the same complaint. The complaint generally alleges that the respondents violated Title VI of the Civil Rights Act of 1964, as amended 42 U.S.C. 2000d *et seq*, and the EPA's nondiscrimination regulations found at 40 C.F.R Part 7.

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The complaint can be refiled for jurisdictional review within sixty (60) calendar days of the conclusion of the litigation. However, if "the state court reviewed evidence presented by both parties and issued a decision, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process." *See* 65 Fed. Reg. 39673.


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This allegation does not meet the EPA's jurisdictional requirements because the Waller County Commissioners Court is not a recipient of the EPA's financial assistance. Thus, this allegation does not meet EPA's jurisdictional criteria, regardless of the ongoing litigation, and the OCR is rejecting it for investigation.

If you have questions regarding this letter, please contact Jerett Yan at (202) 564-3113, or via e-mail at yan.jerett@epa.gov.

Sincerely,


Velveta Golightly-Howell
Director

Enclosures

cc: Kenneth Redden, Acting Assistant General Counsel
Civil Rights and Finance Law Office (MC 2399A)

Samuel Coleman
Deputy Civil Rights Official
US EPA Region VI

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Director, Office of Civil Rights
US Department of Transportation

Megan Mack
Officer for Civil Rights and Civil Liberties
US Department of Homeland Security



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

September 29, 2016

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Return Receipt Requested

Certified Mail #: 7015 1520 0002 0019 3011

In Reply Refer to:

EPA File No: 14R-13-R4

(b) (6)

Brooksville, Florida 34601

Re: Rejection of Administrative Complaint

Dear (b) (6)

On July 24, 2013, the U.S. Environmental Protection Agency (EPA), Office of Civil Rights (OCR) received your administrative complaint alleging that the City of Brooksville, Florida's Community Development Department (CDD) discriminated against members of the African American community by denying them participation in the City of Brooksville Brownfields Program (BBP). After careful review, the OCR has concluded that it cannot accept your administrative complaint for investigation because it does not meet the jurisdictional requirements described in EPA's nondiscrimination regulation found at 40 C.F.R. Part 7. Accordingly, OCR is closing this case as of the date of this letter.

Pursuant to EPA's nondiscrimination regulation, OCR conducts a preliminary review of discrimination complaints to determine acceptance, rejection, or referral. 40 C.F.R. § 7.120(d)(1). To be accepted for investigation, a complaint must meet the jurisdictional requirements described in the EPA's nondiscrimination regulation. First, the complaint must be in writing. 40 C.F.R. § 7.120(b)(1). Second, it must describe an alleged discriminatory act that, if true, may violate the EPA's nondiscrimination regulation (i.e. an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *Id.* Third, it must be filed within 180 days of the alleged discriminatory act. 40 C.F.R. § 7.120(b)(2). Finally, it must be filed against an applicant for, or recipient of, EPA financial assistance that allegedly committed the discriminatory act. 40 C.F.R. § 7.15.

The information offered in your complaint did not provide the OCR with sufficient information to complete the review needed to determine whether the four jurisdictional requirements are met. 40 C.F.R. § 7.120. Most recently in letters dated March 17, 2016; May 11, 2016; and June 8, 2016; and in a phone call July 14, 2016, we sought clarification about your complaint. Specifically, the OCR requested that you provide the following information:

1. Detailed information describing the actions of the City of Brooksville and how these actions prevented or denied African Americans participation in the EPA-assisted Brooksville Brownfields program.
2. The date(s) that these alleged discriminatory acts occurred.

However, OCR has not received a response to any of these requests. On July 28, 2016, OCR emailed a Final Request for Clarification letter to you requesting that you provide OCR with the needed information within fifteen (15) calendar days of your receipt of that request. Because you failed to provide the requested information and there is insufficient information in the record to evaluate jurisdiction, OCR must reject the complaint.

If you have any questions about this correspondence, please contact Samuel Peterson, Case Manager, at (202) 564-5393, by e-mail at peterson.samuel@epa.gov or by mail at U.S. EPA Office of Civil Rights, (Mail Code 1201A), 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460.

Sincerely,



Lilian S. Dorka
Acting Director
Office of Civil Rights

cc: Elise Packard
Associate General Counsel
Civil Rights & Finance Law Office

Kenneth Lapierre
Assistant Regional Administrator
Deputy Civil Rights Official,
U.S. EPA Region 4



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

September 29, 2016

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Return Receipt Requested

Certified Mail#: 7015 1520 0002 0019 2922

In Reply Refer to:

EPA File No. 14R-13-R4

Ms. Jennene Norman-Vacha
City Manager
City of Brooksville, Florida
201 Howell Avenue
Brooksville, FL 34601-2041

Re: Rejection of Administrative Complaint

Dear Ms. Norman-Vacha:

On July 24, 2013, the U.S. Environmental Protection Agency (EPA), Office of Civil Rights (OCR) received an administrative complaint alleging that the City of Brooksville, Florida's Community Development Department (CDD) discriminated against members of the African American community by denying them participation in the City of Brooksville Brownfields Program (BBP). After careful review, the OCR has concluded that it cannot accept the administrative complaint for investigation because it does not meet the jurisdictional requirements described in EPA's nondiscrimination regulation found at 40 C.F.R. Part 7. Accordingly, OCR is closing this case as of the date of this letter.

Pursuant to EPA's nondiscrimination regulation, OCR conducts a preliminary review of discrimination complaints to determine acceptance, rejection, or referral. 40 C.F.R. § 7.120(d)(1). To be accepted for investigation, a complaint must meet the jurisdictional requirements described in the EPA's nondiscrimination regulation. First, the complaint must be in writing. 40 C.F.R. § 7.120(b)(1). Second, it must describe an alleged discriminatory act that, if true, may violate the EPA's nondiscrimination regulation (*i.e.*, an alleged discriminatory act based on race, color, national origin, sex, age, or disability). *Id.* Third, it must be filed within 180 days of the alleged discriminatory act. 40 C.F.R. § 7.120(b)(2). Finally, it must be filed against an applicant for, or recipient of, EPA financial assistance that allegedly committed the discriminatory act. 40 C.F.R. § 7.15.

The information offered in the complaint did not provide the OCR with sufficient information to complete the review needed to determine whether the four jurisdictional requirements are met. 40 C.F.R. § 7.120. Most recently in letters dated March 17, 2016; May 11, 2016; and June 8, 2016; and in a phone call July 14, 2016, we sought

clarification about the complaint. Specifically, the OCR requested that the complainant provide the following information:

1. Detailed information describing the actions of the City of Brooksville and how these actions prevented or denied African Americans participation in the EPA-assisted Brooksville Brownfields program.
2. The date(s) that these alleged discriminatory acts occurred.

However, OCR has not received a response to any of these requests. On July 28, 2016, OCR emailed a Final Request for Clarification letter to the complainant requesting that the complainant provide OCR with the needed information within fifteen (15) calendar days of the receipt of that request. Because the complainant failed to provide the requested information and there is insufficient information in the record to evaluate jurisdiction, OCR must reject the complaint.

If you have any questions about this correspondence, please contact Samuel Peterson, Case Manager, at (202) 564-5393, by e-mail at peterson.samuel@epa.gov or by mail at U.S. EPA Office of Civil Rights, (Mail Code 1201A), 1200 Pennsylvania Avenue, NW, Washington, D.C. 20460.

Sincerely,



Lilian S. Dorka
Acting Director
Office of Civil Rights

cc: Elise Packard
Associate General Counsel
Civil Rights & Finance Law Office

Kenneth Lapierre
Assistant Regional Administrator
Deputy Civil Rights Official,
U.S. EPA Region 4



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 07 2014

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Return Receipt Requested

Certified Mail#: 7004-1160-0002-3622-8851

In Reply Refer to:

EPA File No: 16R-13-R5

(b) (6) Privacy

Decatur, IL 62521

RE: Rejection of Administrative Complaint

Dear **(b) (6) Privacy**

On December 11, 2013, the U.S. Environmental Protection Agency (EPA) received your administrative complaint. In your complaint, you alleged that the Archer Daniels Midland Company (ADM) discriminated against you by denying you the opportunity to interview for a position that you had applied for because of your age, race, and gender. You also stated that ADM retaliated against you due to past litigation about discriminatory practices and thus violated the EPA's nondiscrimination regulations found at 40 C.F.R. Part 7.

Pursuant to the EPA's nondiscrimination regulations, the Office of Civil Rights (OCR) conducts a preliminary review of discrimination complaints to determine acceptance, rejection, or referral (See 40 C.F.R. § 7.120(d) (1)). For a complaint to be accepted for investigation, the complaint must meet the jurisdictional requirements described in the EPA's Part 7 regulations (nondiscrimination regulations).

First, the complaint must be in writing. Second, the complaint must describe an alleged discriminatory act that, if true, would violate the EPA's nondiscrimination regulations (*i.e.*, an alleged discriminatory act based on race, color, national origin, sex, or disability). Third, the complaint must be filed within 180 days of the alleged discriminatory act. Finally, the complaint must be filed against an applicant for, or recipient of, EPA assistance that allegedly committed the discriminatory act. For your reference, a copy of the EPA's nondiscrimination regulations is enclosed.

After careful consideration by OCR, the EPA cannot accept your allegations for investigation because they do not meet the jurisdictional requirements required by the EPA's nondiscrimination regulations. The EPA concluded that the allegations described in the complaint do not meet the EPA's jurisdictional requirements because the Archer Daniels Midland Company is not a current recipient of EPA assistance. Pursuant to its

nondiscrimination regulations, the EPA finds that it lacks legal jurisdiction to investigate your complaint further and is rejecting the complaint on this basis.

If you have questions regarding this letter, please contact Ericka Farrell of the OCR External Compliance Program at (202) 564-0717, or via electronic mail at farrell.ericka@epa.gov.

Sincerely,



Velveta Golightly-Howell
Director
Office of Civil Rights

Enclosure

cc: Ken Redden, Acting Associate General Counsel
Civil Rights and Finance Law Office (MC 2399A)

Bharat Mathur, Deputy Civil Rights Official
EPA Region 5 (MC R-19J)

Aaron Price
EPA Region 5 (MC C-14J)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 07 2014

OFFICE OF
CIVIL RIGHTS

Return Receipt Requested

Certified Mail#: 7004-1160-0002-3622-8868

In Reply Refer to:

EPA File No.: 16R-13-R5

Patricia A. Woertz
Chief Executive Officer
Arthur Daniels Midland Company
4666 Faries Parkway
Decatur, IL 62526-5630

RE: REJECTION OF ADMINISTRATIVE COMPLAINT

Dear Ms. Woertz:

This letter is to notify you that the U.S. Environmental Protection Agency (EPA) received an administrative complaint on December 11, 2013, alleging that the Archer Daniels Midland Company (ADM) violated Title VI of the Civil Rights Act of 1964, as amended, and the EPA's nondiscrimination regulations found at 40 C.F.R Part 7.

Pursuant to the EPA's nondiscrimination regulations, the Office of Civil Rights (OCR) conducts a preliminary review of discrimination complaints to determine acceptance, rejection, or referral (See 40 C.F.R. § 7.120(d)(1)). For a complaint to be accepted for investigation, the complaint must meet the jurisdictional requirements described in the EPA's Part 7 regulations (nondiscrimination regulations).

First, the complaint must be in writing. Second, the complaint must describe an alleged discriminatory act that, if true, would violate the EPA's nondiscrimination regulations (*i.e.*, an alleged discriminatory act based on race, color, national origin, sex, or disability). Third, the complaint must be filed within 180 days of the alleged discriminatory act. Finally, the complaint must be filed against an applicant for, or recipient of, EPA assistance that allegedly committed the discriminatory act. For your reference, a copy of the EPA's nondiscrimination regulations is enclosed.

The OCR has concluded that the allegations described in the complaint do not meet the EPA's jurisdictional requirements because the Archer Daniels Midland Company is not a current recipient of EPA assistance. Pursuant to our nondiscrimination regulations, the EPA finds that it lacks legal jurisdiction to investigate this complaint further and is rejecting the complaint on this basis.

If you have questions regarding this letter, please contact Ericka Farrell of the OCR External Compliance Program at (202) 564-0717, or via electronic mail at farrell.ericka@epa.gov.

Sincerely,



Velveta Golightly-Howell
Director
Office of Civil Rights

Enclosure

cc: Ken Redden, Acting Associate General Counsel
Civil Rights and Finance Law Office (MC 2399A)

Bharat Mathur, Deputy Civil Rights Official
EPA Region 5 (MC R-19J)

Aaron Price
EPA Region 5 (MC C-14J)